SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 257.

W. E. RAKES, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

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1 Transcript of Record.

UNITED STATES OF AMERICA,
Western District of Virginia.

Pleas in the District Court of the United States for the Western District of Virginia, at Lynchburg, before the Honorable Henry C. McDowell, judge of the District Court aforesaid, on Tuesday, the 15th day of October, Anno Domini 1907, and in the 132nd year of the Independence of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFF,
versus
WILLIAM E. RAKES, GROVER BEAMER, PEACH Rakes, George Booth, George Martin, defendants.

Indictment for conspiracy and murder. (Vio. secs. 5508–9 R. S.)

Be it remembered, that heretofore, to wit: At a regular term of the said District Court of the United States for the Western District of Virginia, continued and held at Lynchburg, on Friday, the 13th day of September, A. D. 1907, the following proceedings were had in said cause.

Present: Honorable Henry C. McDowell, district judge.

Order finding indictment.

Entered September 13th, 1907.

The grand jury (E. F. Sheffey, foreman, P. D. Watts, Z. E. Dameron, M. P. Gatewood, Wm. A. Moses, Samuel T. Smith, Winston P. Holland, W. H. White, J. J. Carter, W. A. Mason, Frederick Oakes, Thomas B. Moorman, John W. Childs, F. B. Flippin, George P. Seay, R. A. Craig, George W. Cabell, S. M. Davidson, and John Champ, gentlemen, who were empanelled and sworn a grand jury of inquest in and for the body of the United States for the Western District of Virginia, at Lynchburg, on the 10th day of September,
2 1907) again appeared pursuant to their adjournment, and reported the following indictment, to wit:

Indictment against Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, and George Martin, for Vio. sec. 5508 and 5509, R. S. (conspiracy and murder): "A true bill."

Indictment.

Filed September 13, 1907.

UNITED STATES OF AMERICA,
Western District of Virginia, Lynchburg Division.

In the District Court of the United States in and for the Western District of Virginia, at the September term thereof, 1907:

The grand jurors of the United States, impaneled, sworn, and charged, at the term aforesaid, of the court aforesaid, on their oaths present:

That heretofore, to wit, on the — day of March, 1907, William E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors unknown, late of Patrick and Franklin counties in the district aforesaid, did within the said county of Patrick and within the judicial district aforesaid, unlawfully and feloniously combine, conspire, confederate, and agree together and amongst themselves to injure, oppress, threaten, and intimidate one Peter Hall, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States, and because of his having so exercised the same—that is to say, the right and privilege of giving to the officers of the United States Government information as to the violation of the internal-revenue laws of the United States by said Wm. E. Rakes, Grover Beamer, and others,
3 which information as to violations of the internal-revenue laws was as follows, to wit: That on or about the — day of December, 1906, said Peter Hall reported to J. W. Staples, deputy marshal, an official of the United States, and to A. H. Staples, special employee of the Internal-Revenue Bureau, and likewise an official of the United States, that said Wm. E. Rakes was operating a distillery without having given the bond required by law and with intent to defraud the United States of the internal-revenue taxes upon the spirits being distilled by him, and that on the — day of February, 1907, he gave information to said J. W. Staples and A. H. Staples, officials of the United States Government as aforesaid, to the effect that said Grover Beamer was operating a distillery without having given the bond required by law and with intent to defraud the United States of the taxes on the spirits distilled by him, he, the said Peter Hall, then and there being a citizen of the United States and lawfully entitled to give such information to the said officers of the United States.

And that while in the act of so combining, conspiring, confederating, and agreeing together and amongst themselves as aforesaid, and for the purposes aforesaid, did, unlawfully and feloniously, at the time and place aforesaid, with intent to threaten, beat, injure, intimidate, and kill the said Peter Hall, and in furtherance of such attempt, and in attempting to carry out and execute the said conspiracy, in and upon one Ann Hall then and there being, feloniously, wilfully, and of their malice aforethought, make an assault, and that the said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors unknown, with guns loaded with gunpowder and leaden shot, which said guns they, the said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors unknown, in their hands then and there held, then and there feloniously, wilfully, and of their malice aforethought, did discharge and
4 shoot off at, against, and upon the said Ann Hall, and that the said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors

unknown, with the guns shot off as aforesaid then and there feloniously, wilfully, and of their malice aforethought, did strike, penetrate, and wound the said Ann Hall in and upon the body of her the said Ann Hall, giving to her the said Ann Hall then and there with the shot as aforesaid so as aforesaid discharged and shot off out of the said guns aforesaid, mortal wounds, of which mortal wounds she the said Ann Hall then and there instantly died.

And so the grand jurors aforesaid, on their oaths aforesaid, do say that the said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors unknown, did commit the crime of conspiracy in manner and form aforesaid, and for the objects aforesaid, and that while in the act of so combining, conspiring, confederating, and agreeing together and amongst themselves as aforesaid, and for the purpose aforesaid, they, the said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors unknown, did unlawfully, feloniously, and wilfully, and of their malice aforethought, commit the crime of wilful, deliberate, and premeditated murder, which is a felony under the laws of the State of Virginia, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Second count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the — day of March, 1907, said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors unknown, late of Patrick and Franklin counties, in the district
5 aforesaid, did, within the said county of Patrick and within the judicial district aforesaid, unlawfully and feloniously combine, conspire, confederate, and agree together and amongst themselves, to injure, oppress, threaten, and intimidate one Peter Hall, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States, and because of his having so exercised the same—that is to say, the right and privilege of giving to the officers of the United States Government information as to violations of the internal-revenue laws of the United States by said Wm. E. Rakes, Grover Beamer, and others, which information was as follows, to wit, that on or about the — day of December, 1906, said Peter Hall reported to J. W. Staples, deputy marshal, an official of the United States, and to A. H. Staples, special employee of the Internal-Revenue Bureau, and likewise an official of the United States, that said Wm. E. Rakes was operating a distillery without having given the bond required by law and with intent to defraud the United States of the internal-revenue taxes upon the spirits so being distilled by him, and that on the — day of February, 1907, he gave information to said J. W. Staples and A. H. Staples, officials of the United States Government as aforesaid, to the effect that said

Grover Beamer was operating a distillery without having given the bond required by law and with intent to defraud the United States of the taxes on the spirits distilled by him, he, the said Peter Hall, then and there being a citizen of the United States and lawfully entitled to give such information to the officers of the said United States.

And that while in the act of so conspiring, combining, confederating, and agreeing together and amongst themselves as aforesaid, and for the purposes aforesaid, and that in pursuance of said conspiracy and to effect the object thereof, and for the purpose of injuring, oppressing, threatening, and intimidating the said Peter Hall
6 in the free exercise and enjoyment of his said right and privilege secured to him as aforesaid, and because of his having so exercised the same, and because of his having given the information aforesaid to the said officers of the United States, the said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors unknown, did unlawfully and feloniously at the time and place aforesaid, with intent to threaten, beat, injure, intimidate, and kill the said Peter Hall, and in furtherance of such conspiracy and attempt, and in attempting to execute and carry out the said conspiracy, in and upon one Ann Hall then and there being, feloniously, wilfully and of their malice aforethought make an assault, and that the said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors unknown, with guns loaded with gunpowder and leaden shot, which said guns they the said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors unknown, in their hands then and there held, then and there feloniously, wilfully, and of their malice aforethought did discharge and shoot off at, against, and upon the said Ann Hall, and that the said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors unknown, with the guns shot off as aforesaid, then and there feloniously, wilfully, and of their malice aforethought, did strike, penetrate, and wound the said Ann Hall in and upon the body of her the said Ann Hall, giving to her the said Ann Hall, then and there with the shot as aforesaid so as aforesaid discharged and shot off out of the said guns aforesaid, mortal wounds, of which mortal wounds she the said Ann Hall then and there instantly died.

And so the grand jurors aforesaid, upon their oaths aforesaid, do say, that the said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to
7 the grand jurors unknown, did commit the crime of conspiracy in manner and form aforesaid, and for the objects aforesaid, and that while in the act of so combining, conspiring, confederating, and agreeing together and amongst themselves as aforesaid, and for the purpose aforesaid, they the said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors unknown, did unlawfully, feloniously, and wil-

fully, and of their malice aforethought, commit the crime of wilful, deliberate, and premeditated murder, which is a felony under the laws of the State of Virginia; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

THOS. L. MOORE,
United States Attorney for the Western District of Virginia.

Endorsements on indictment.

A true bill.

EDWARD F. SHEFFEY,
Foreman Grand Jury.

FILED SEPT. 13th, 1907.

WM. MCCAULEY, *Clerk.*

And at another day, to wit: At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Lynchburg, on Monday, the 23rd day of September, 1907. Present: Honorable Henry C. McDowell, district judge.

8 *Order as to filing plea of William E. Rakes to the jurisdiction of the court; denying the prayer of said plea; overruling demurrers to the indictment, and granting the motion of defendant, Grover Beamer, to be tried separately.*

Entered September 23, 1907.

UNITED STATES *vs.* WILLIAM E. RAKES, GROVER BEAMER, PEACH RAKES, GEORGE MARTIN, and GEORGE BOOTH.	Indictment No. 1844, under sections 5508 and 5509, R. S.

This day came the United States by its attorney, and the defendants having been set to the bar of the court by the marshal, came also the attorneys for the defendants. And thereupon the defendant William E. Rakes, in his own proper person, offered to file a plea in writing to the jurisdiction of the court, and the United States by counsel filed written objections to the reception of said plea, and also not waiving said objections filed a demurrer thereto, the grounds of which are set out in writing this day filed, and upon argument of counsel it is considered by the court that the objections to the filing of said plea and that the aforesaid demurrer thereto be, and the same are, hereby overruled; and the said plea was accordingly filed. And thereupon the United States by counsel offered to file a replication in writing to said plea, and the defendant William E. Rakes, by counsel, objected to the reception of said replication and moved for judgment on the said plea, and thereupon the court allowed the United States to withdraw its demurrer to said plea, to which action of the court the defendant, by counsel, then and there excepted; and the said demurrer having been withdrawn, the court allowed the said replication to be filed, which was accordingly done, and to this action of the

court the said defendant, by counsel, then and there excepted. And thereupon said defendant, by counsel, moved to strike out
9 the said replication for the following reasons:

1st. That there is nothing in said replication which shows any reason why judgment upon said plea should be withheld from this defendant.

2nd. That the said replication is wholly argumentative.

3rd. That the said replication purports to set up new matter and is not properly verified.

4th. That the said replication shows upon its face that judgment on said plea should be entered for this defendant.

5th. It was error of law to permit the filing of said replication.

And argument of counsel having been heard, the court overruled the motion of the defendant to strike from the files and exclude said replication, and to this action of the court the said defendant, by counsel, then and there excepted.

Thereupon the said defendant filed a special rejoinder in writing, and thereupon the United States, by its attorney, moved to strike said rejoinder from the files. And upon argument of counsel, the court being of opinion that said special rejoinder is neither a traverse nor in confession and avoidance, sustained said motion and ordered said special rejoinder stricken from the files. And to this action of the court the said defendant, by counsel, then and there excepted. And thereupon the said defendant, by counsel, rejoined generally, and the United States doth alike, and issue was joined.

And thereupon the court entered upon the trial of said issue and heard the testimony of witnesses and inspected the written evidence introduced. On consideration whereof it is considered by the court that the Government has maintained the issue joined upon its part. Thereupon the defendant moved for judgment upon said plea, notwithstanding the said conclusion of the court. But the court overruled said motion, and it is considered by the court that the prayer of the defendant's plea be denied and that this court do pro-
10 ceed with the trial of the indictment in this court pending. To which ruling of the court the said defendant W. E. Rakes then and there excepted.

And thereupon all of the above-mentioned defendants having stood up at the direction of the clerk, the said clerk read distinctly to said defendants the indictment No. 1844, mentioned in the caption hereto. And thereupon each of the defendants jointly and severally demurred to said indictment and to each count thereof—the grounds thereof being in writing and filed. And the United States by its attorney joined in said demurrers and upon consideration thereof and of the argument of counsel, it is considered by the court that said demurrers be and they are hereby overruled. And to this action all and each of said defendants excepted then and there.

And thereupon each of the defendants, having been asked by the clerk whether guilty or not guilty as charged in the said indictment, answered, "not guilty." And thereupon each of said defendants

moved the court that the trial of each of the defendants be held separately. And upon consideration of said motion, the court doth grant the motion in behalf of the defendant Grover Beamer, and takes under consideration and holds in abeyance decision upon the motions of the remaining defendants.

And thereupon the United States elected to first put said Grover Beamer on trial, and thereupon all of the defendants except the said Grover Beamer were remanded to the custody of the marshal—the said Beamer remaining at the bar of the court.

11 *Plea of Wm. E. Rakes to the jurisdiction of the court.*

Filed September 23, 1907.

In the District Court of the United States for the Western District of Virginia:

THE UNITED STATES
v.
WILLIAM E. RAKES ET ALS.

The defendant, W. E. Rakes, comes in his own proper person, and for a plea says that he ought not further to be at this time held in custody or put to trial of for the offense alleged in this indictment; for that heretofore, on the 25th day of March, 1907, in the county of Patrick, Virginia, at a coroner's inquest then and there held upon the body of Ann Hall to inquire as to the time, place and cause and manner of her death, a verdict was returned by the coroner's jury then and there empanneled for the inquest aforesaid, which verdict is in words and figures as follows:

That the said Ann Hall met her death by gunshot wounds discharged from a shotgun, or shotguns, and that W. E. Rakes and Grover Beamer are accessories to said murder.

That thereupon, on the 26th day of March, 1907, in said county, this defendant was taken into the custody of the officers of the State of Virginia to answer the charge of murder of the said Ann Hall, and was admitted to bail in the sum of $1,000.00, to appear on the first day of the May, 1907, term of the Circuit Court of Patrick County;

That at the May term of the Circuit Court of the said county of Patrick, the grand jurors in and for the body of the said
12 county, returned an indictment against this defendant, charging this defendant with the murder of the said Ann Hall, a certified copy of which indictment is herewith tendered to this court.

That between the date of the said arrest and the recognizance of this defendant in the said State court as aforesaid and the finding of the said indictment, this defendant was, while still in the custody of the State court, and in the custody and charge of the State of Virginia, arrested by the United States upon a charge of a conspiracy resulting in the alleged murder of the said Ann Hall, and has been, and still is, under the restraint of arrest and imprisonment by the United States under said last-named charge from that time until

this date, during which period the indictment herein pending was found and returned into this court:

That on the first day of June, 1907, a day of the May term, 1907, of the said Circuit Court of Patrick County, while in the custody of the United States as aforesaid, this defendant appeared before the said Circuit Court of Patrick County, pursuant to his said recognizance in said court, to answer the said indictment found in said court, and was admitted to bail in the sum of one thousand dollars, conditioned to appear on the first day of the next August, 1907, term of said court, whereupon the said indictment pending in said State court was continued, and this defendant remained and continued, and now is, in the custody of the United States in this court.

That upon the convening of the August, 1907, term of the said Circuit Court of Patrick County, the case therein pending in said court against this defendant was called, and this defendant being in the custody of the said United States, and unable to
13 appear in said court, no action has been so far taken in said case, and no order has as yet been entered in said court, and the said indictment stands undisposed of in said State court, which said August term has not yet adjourned, but has been kept open until the — day of Sept., 1907.

And the said W. E. Rakes avers that he is the same person who was arrested, bailed, indicted, and again bailed in the said Circuit Court of Patrick County, Virginia, as aforesaid, and while in the custody of said State court arrested and detained by the United States as aforesaid; that the said State court first obtained jurisdiction of this defendant before his arrest by the said United States; that the said indictment still pends in said State court undisposed of and undetermined; that he is still and should be permitted to remain in the lawful custody of said State court and is improperly here held and detained.

Wherefore the said defendant prays the judgment of this court upon this his plea that he should be no further held, detained, or proceeded with in this court, and that he should be forthwith discharged from further custody and detention here, and no further proceedings herein taken in the premises until the indictment pending as aforesaid in said State court be finally determined or disposed of.

The said defendant therefore tenders to the court a copy of the finding and verdict of the coroner's jury as aforesaid, his recognizance taken pursuant thereto, the said indictment pending in said State court, his recognizance taken pursuant thereto, and the certificate of the deputy clerk of the said Circuit Court of Patrick County, Virginia, as to the correctness and authenticity of said copies and the completeness of the record as shown by said copies in said court of all proceedings therein.

W. E. RAKES.

STATE OF VIRGINIA,

City of Lynchbury, to wit:

14 I, H. H. Martin, deputy clerk of the corporation court for said city, do hereby certify that W. E. Rakes, the defendant named in the foregoing plea, this day personally appeared before

me in my said city, and being by me first duly sworn says upon oath, that he is the defendant therein named, and that all of the facts, things, and matters therein set forth and enumerated are true.

Given under my hand this 12th day of September, 1907.

H. H. MARTIN,
Deputy Clerk of Lynchburg Corporation Court.

15 *Orders of Circuit Court of Patrick County.*

Filed with plea of defendant, September 23, 1907.

At a circuit court continued and held for the county of Patrick at the court-house thereof on the 29" day of May, 1907.

The grand jury adjourned over on yesterday appeared according to their adjournment and were sent to their room to consult, and after some time returned into court having found the following indictments, viz, * * * An indictment vs. W. E. Rakes and Grover Beamer for murder. A true bill. C. L. Barnard, foreman.

At a circuit court continued and held for the county of Patrick at the court-house thereof 1" day of June, 1907.

W. E. Rakes, who stands jointly indicted with Grover Beamer for murder, was this day led to the bar in custody of the jailer of this court, and on his motion by counsel he is admitted to bail in the sum of $1,000, with security in a like sum, whereupon he, together with C. P. Nolen, his surety, entered into and acknowledged a bond in the penalty of one thousand dollars conditioned for the personal appearance of the said Rakes before the court on the 1" day of the next term to answer to said charge against him.

VIRGINIA, PATRICK COUNTY, TO WIT:

I, Robt. N. Clark, depty. clerk of the circuit court for the county and State aforesaid, do certify that the two foregoing orders and the indictment is all of the records in my office pertaining to the case of Commonwealth vs. W. E. Rakes, charged with murder.

Teste:

ROBT. N. CLARK, *D. Clerk.*

16 *Indictment against Wm. E. Rakes, found in Circuit Court of Patrick County.*

Filed with defendant's plea Sept. 23, 1907.

COMMONWEALTH OF VIRGINIA,
County of Patrick, to wit:

In the Circuit Court of said county, May term, 1907.

The grand jurors of the Commonwealth of Virginia in and for the body of the county of Patrick and now attending the said court upon their oaths present that Wm. E. Rakes and Grover Beamer on the — day of March, 1907, in said county, in and upon one Anne Hall, in the peace of God and the people of this Commonwealth, then and there being feloniously, wilfully, and of their malice aforethought

did make an assault; and the said Wm. E. Rakes and Grover Beamer with a certain shotgun then and there loaded with gunpowder and leaden shot, which shotgun they then and there had and held in their hands to against and upon the said Anne Hall then and there feloniously, wilfully, and of their malice aforethought did shoot and discharge; and the said Wm. E. Rakes and Grover Beamer with the leaden shot aforesaid then and there by force of the gunpowder and shot sent forth as aforesaid, the said Wm. E. Rakes and Grover Beamer in and upon the body of her the said Anne Hall then and there feloniously, wilfully, and of their malice aforethought did strike, penetrate, and wound, giving to her the said Anne Hall then and there, with the leaden shot aforesaid, so as aforesaid shot sent forth and discharged out of the pistol aforesaid by the said Wm. E. Rakes and Grover Beamer in and upon the body of her the said Anne Hall one mortal wound, of which said mortal wound the said Anne Hall then and there instantly died, and so the jurors aforesaid upon their oaths aforesaid do say that the said Wm. E. Rakes and Grover Beamer the said Anne Hall in manner and form aforesaid,
17 feloniously, wilfully, and of their malice aforethought did kill and murder, against the peace and dignity of the Commonwealth of Virginia.

This indictment is found upon the testimony of Nancy J. Hall and Joseph Hall, witnesses sworn by the court and sent to give evidence before the grand jury.

A true bill.

A copy teste:

C. L. BARNARD, *Foreman.*
ROBT. N. CLARK, *D. Clerk.*

Finding of coroner's jury.

Filed with defendant's plea Sept. 23, 1907.

An inquisition taken at the residence of Jane Hall in the county of Patrick on the 25th day of March, 1907, before J. H. Dillen, J. P. & acting coroner of the said county.

Upon the view of the body of Annie Hall there lying dead, the jurors sworn to inquire when, how, and by what means the said Annie Hall came to her death upon their oaths do say:

That the said Annie Hall met her death by gunshot wounds discharged from a shotgun or shotguns, and that W. E. Rakes and Grover Beamer are accessories to said murder.

In testimony whereof the said acting coroner and jurors have hereto set their hands.

J. H. DILLEN, *J. P. & Acting Coroner.*
W. A. ELGIN, *Foreman.*
J. W. THOMAS,
W. A. ROBERSON,
G. L. ROBERSON.

A copy, teste:

ROBT. N. CLARK, *D. C.*

18 *Certificate of clerk of Circuit Court of Patrick County as to recognizance of Wm. E. Rakes.*

Filed with defendant's plea Sept. 23, 1907.

The within accused W. E. Rakes is hereby held in a bond of one thousand dollars ($1,000.00) for his appearance first day of the May term of Patrick County Circuit Court with C. P. Nolen as surety.

March 26, 1907.

A copy, teste:

J. H. DILLEN, *J. P.*
ROBT. N. CLARK, *D. C.*

Objections, demurrer and replication to plea to the jurisdiction of the court.

Filed September 23, 1907.

In the District Court of the United States for the Western District of Virginia.

THE UNITED STATES
vs.
WILLIAM E. RAKES.

Now comes the plaintiff by Thomas L. Moors, United States attorney for the Western District of Virginia, and objects to the filing of a plea in abatement by the defendant, and bases said objection upon the following grounds, to wit:

1. The matter therein set out does not show any legal cause against the jurisdiction of this court.

2. The record filed with said plea is not a complete record of the proceedings in the circuit court of Patrick County, Virginia.

19 Without waiving said objection, the plaintiff demurs to said plea and says the same is not sufficient in law,

1. Because it does not show any just or legal reason why this court should not proceed to the trial of the case upon its merits.

2. Because said plea and the exhibits filed therewith, shows upon its face that the defendant Wm. E. Rakes is not now held in custody by the circuit court of Patrick County, Virginia.

This court will take judicial notice of the fact that the terms of the circuit court of Patrick County, Virginia, are held in February, May, August, and November. The indictment in said circuit court was found at the May term of said court, 1907, and on the first day of June, 1907, and during said term, Wm. E. Rakes entered into a recognizance for his appearance at the August term of the court, which began on the 27 day of August. At the said August term no action was taken in said case. Said Wm. E. Rakes was not required to enter into any further recognizance for his appearance at that or any future term of the court, nor has any process of arrest

been issued by said circuit court of Patrick County arresting the said Wm. E. Rakes and holding him to answer the indictment returned against him in the State court and filed as an exhibit with his said plea in abatement, nor has there been any appearance or defense made by the said Wm. E. Rakes to the said prosecution in the State court either by plea, demurrer or otherwise.

3. The record further discloses that so far as the State court is concerned Wm. E. Rakes is not in custody of that court, the custody of the person of the said Wm. E. Rakes having lapsed or been abandoned.

4. Because the exhibits filed with said plea, which purport to be a record of the case against Wm. E. Rakes in the circuit court of Patrick County, are not properly authenticated, the certificate of the clerk not being dated and not being under the seal of his court.

20 5. And for other defects apparent upon the face of said plea and the exhibits therewith filed, and without waiving the said objection and demurrer to said plea, plaintiff replies generally to the allegations therein contained, and for general and special grounds the following are assigned:

1. That upon the commission of the offense charged in the indictment against the defendant Wm. E. Rakes and his coconspirators the Commonwealth's attorney of Patrick County repaired to the scene of the murder and summoned a coroner's jury, and the result of their inquisition was that Wm. E. Rakes and Grover Beamer were guilty of the murder, this fact appearing from such evidence as was obtainable on the day after the murder, and upon their warrant Wm. E. Rakes, the only defendant who could be arrested, was held to answer to the State authorities of Virginia; that it was apparent to the Commonwealth's attorney of Patrick County that the offense which had been committed was a violation of the Federal laws and the fact was reported to the Federal authorities. The coroner's inquest was held on or about March 26, 1907. Such evidence as was developed before the coroner's inquest was brought before the grand jury of the Federal Court in this district on the — day of April, 1907, at the request of and with the knowledge and acquiescence of the State officials of Virginia charged with the duty of prosecuting and trying the said W. E. Rakes; that it was apparent at that time that the aforesaid officials of the State of Virginia could not obtain the evidence and speedily secure the arrest of all the defendants; that at the request of the aforesaid State authorities of Patrick County the Federal Government immediately proceeded, through its officials charged with such duties, to obtain the evidence in the case and to secure the arrest of all the defendants, which was at once done, at great expense, tracing one of the defendants through several States; that at the request of the aforesaid State officers of

21 Patrick County the Government took cognizance and jurisdiction of the case, and on the 9th day of April, 1907, witnesses were brought before the grand jury of this court and an indictment returned at said April term against said Wm. E. Rakes and Grover

Beamer, and the fact that the other defendants, jointly charged with them in an indictment returned at the August term of this court, were coconspirators, was unknown at that time. The arrest of all of the defendants by the Federal authorities, including the defendant Wm. E. Rakes, and the preparation of the evidence by the Federal authorities for trial in this court has been with the knowledge, approval, and acquiescence of the aforesaid State officials; that the said State officials have not at any time nor are they now contemplating or preparing for a trial of the case of the Commonwealth of Virginia vs. Wm. E. Rakes set up in the plea. After the indictment in the Federal court was returned the said State officials made no further effort to place him upon trial. He has never appeared in the State court and demanded a trial, nor has he entered any demurrers or pleas to said indictment in the State court, nor has he been arraigned therein for trial. He is charged here with the violation of a Federal statute, and the Federal court has exclusive jurisdiction for the trial of the offense against him. The circuit court for Patrick County has not assumed and does not now pretend to have taken jurisdiction of the prisoner for the trial of the case for which he is indicted in the State court. The jurisdiction of that court is not being asserted here by any of its officials, but on the contrary they are treating it as if their jurisdiction had been relinquished to this court, and the said State court has not the custody of the person of Wm. E. Rakes. That no objection has ever been made by any of the said officials of the State of Virginia or of the court authorities of Patrick County to the custody of the person of Wm. E. Rakes, nor to the jurisdiction of this court; that the said officials of Patrick County, including the judge and the Commonwealth's
22 attorney for that county, believe that the jurisdiction of the circuit court of Patrick County, as well as the custody of the person of Wm. E. Rakes had been relinquished to this court. That the witnesses both for the Government and the defendant have been brought to this court at Government expense for the trial of the case; that all of the facts above enumerated have been with the knowledge, approval, and acquiescence of all of the aforesaid State officials of Virginia, including the judge and Commonwealth's attorney of Patrick County, Virginia. That the last term of the circuit court of Patrick County began on the 27th day of August, 1907; that at that term there was no appearance in said court of either the Commonwealth or the defendant Wm. E. Rakes in the prosecution against him set out in the plea; no recognizance was required of him at the August term of the said circuit court for his appearance at that or any subsequent term, nor has any process of arrest or other process issued by the State of Virginia to secure his attendance upon said court at said August term or at any other term, nor does the prosecuting attorney intend to ask for any order or process at said August term, 1907; that at said term the said judge and other officials of said county court treated the case as one not for trial in that court;

that the defendant Wm. E. Rakes is not now under any recognizance to answer in the circuit court of Patrick County, nor under any process of arrest issued by said court, but on the contrary is held by the process of this court only.

And this the plaintiff is ready to verify.

THOS. L. MOORE,
U. S. Atty.

Upon knowledge, information, and belief, Thos. L. Moore, U. S. atty., makes oath before me that the matter set out in the foregoing replication is true.

Given under my hand Sept. 13, 1907.

W. M. MAUZY, *D. Clk.*

23 *Special rejoinder of defendant William E. Rakes to replication of plaintiff.*

Filed September 23, 1907.

The defendant W. E. Rakes, not waiving his objections to the filing of said replication, but insisting thereon, excepts to the action of the court in overruling the motion to strike out said replication, whereupon the said defendant says:

1st. That his bail bond in said circuit court of Patrick County is in full force and effect.

2nd. That his bondsman on said bond is here present in court.

3rd. That the Commonwealth's attorney for the county of Patrick is here present in court.

And this he is ready to verify.

Grounds of demurrer of Grover Beamer and William E. Rakes to indictment.

Filed September 23, 1907.

In the District Court of the United States for the Western District of Virginia.

THE UNITED STATES
v.
WILLIAM E. RAKES ET AL.

Demurrer.

The joint and several demurrer of Grover Beamer and Wm. E. Rakes to the indictment returned by the grand jurors of the United States Court for the Western District of Virginia at the August, 1907, term thereof into said court, and to each count thereof and the assignments of the grounds for the said demurrer.

The defendants Grover Beamer and Wm. E. Rakes demur jointly and severally to the said indictment and each count thereof for this:

24 *First.*—That the records of this court will show that pursuant to the finding of the said indictment a capias was issued against and executed upon the said defendant and that there has not been awarded him a preliminary examination. The defendant craves oyer of the records in this behalf to be read in support of this demurrer.

Second.—The first count in said indictment is insufficient for this:

I.

The only Federal offense sought to be charged is a conspiracy to injure, oppress, threaten, and intimidate one Peter Hall: (a) In the free exercise of a right and privilege secured to him by the Constitution and laws of the United States; and (b) because of his having exercised such a right the alleged conspiracy is—

1st. Charged as a conclusion of law.

2nd. Not charged with sufficient certainty.

II.

The right of the said Peter Hall alleged to have been secured by the Constitution and laws of the United States is—

1st. Charged as a conclusion of law.

2nd. Not charged with sufficient certainty.

III.

The alleged assault upon and murder of Ann Hall is not properly charged to have been done in the act of violating any of the provisions of § 5508 of the Revised Statutes of the United States.

IIII.

The legal effect of the alleged overt arts is not properly charged.

25 *Third.*—The only Federal offense sought to be charged is: A conspiracy to injure, oppress, threaten, and intimidate one Peter Hall: (a) In the free exercise of a right and privilege secured to him by the Constitution and laws of the United States; and (b) because of his having exercised such a right. The alleged conspiracy is—

1st. Charged as a conclusion of law.

2nd. Not charged with sufficient certainty.

The said second count is insufficient for the foregoing reasons.

Fourth.—The said second count is insufficient for the reasons assigned and enumerated as II, III, and IIII, in refernce to the first count.

Wherefore the said defendant says that the said indictment is wholly insufficient in law and is bad for duplicity as to each count thereof, and prays that the same may be declared by this court as insufficient to support an arraignment, trial, verdict, or judgment of or against this defendant.

Grounds of demurrer of Peach Rakes, George Martin, and George Booth to indictment.

Filed September 23, 1907.

In the District Court of the United States for the Western District of Virginia.

THE UNITED STATES
v.
WILLIAM E. RAKES ET AL.

Demurrer.

26 The joint and several demurrer of Peach Rakes, George Martin, & George Booth to the indictment returned by the grand jurors of the United States Court for the Western District of Virginia at the August, 1907, term thereof into said court and to each count thereof and the assignments of the grounds for said demurrer.

The defendants Peach Rakes, George Martin, & George Booth jointly and severally demur to the said indictment and each count thereof for this:

First.—

Second.—The first count in said indictment is insufficient for this:

I.

The only Federal offense sought to be charged is a conspiracy to injure, oppress, threaten, and intimidate one Peter Hall: (a) In the free exercise of a right and privilege secured to him by the Constitution and laws of the United States; and (b) because of his having exercised such a right. The alleged conspiracy is—

1st. Charged as a conclusion of law.

2nd. Not charged with sufficient certainty.

II.

The right of the said Peter Hall alleged to have been secured by the Constitution and laws of the United States is—

1st. Charged as a conclusion of law.

2nd. Not charged with sufficient certainty.

III.

The alleged assault upon and murder of Ann Hall is not properly charged to have been done in the act of violating any of the provisions of § 5508 of the Revised Statutes of the United
27 States.

IIII.

The legal effect of the alleged overt acts is not properly charged.

Third.—The only Federal offenses sought to be charged are a conspiracy to injure, oppress, threaten, and intimidate one Peter Hall: (a) In the free exercise of a right and privilege secured to him by the Constitution and laws of the United States; and (b) because of his having exercised such a right. The alleged conspiracy is—

1st. Charged as a conclusion of law.

2nd. Not charged with sufficient certainty.

The said second count is insufficient for the foregoing reasons.

Fourth.—The said second count is insufficient for the reasons assigned and enumerated as II, III, and IIII in reference to the first count.

Wherefore the said defendants say that the said indictment is wholly insufficient in law and is bad for duplicity as to each count thereof, and pray that the same may be declared by this court as insufficient to support an arraignment, trial, verdict, or judgment of or against these defendants.

Order overruling motion of defendant William E. Rakes to discharge him from the custody of the marshal, and as to empaneling jury.

Entered October 7, 1907.

And at another day, to wit: At a regular term of the District Court of the United States for the Western District of
28 Virginia, continued and held at Lynchburg, on Monday, the 7th day of October, 1907.

Present, Honorable Henry C. McDowell, district judge.

This day again came the United States by its attorney, and the defendant Wm. E. Rakes having been again set to the bar of the court by the marshal, came also the defendant's attorneys, and both sides having answered ready for trial, the defendant, by counsel, moved to quash the writ of venire facias, but assigned no ground therefor, and declined to assign any ground; and thereupon the court overruled said motion, and the defendant, by counsel, excepted. And thereupon the defendant, by counsel, moved that he be discharged from the custody of the marshal on the ground that the Circuit Court of Patrick County had obtained prior jurisdiction of his person, but the court, for reasons given in overruling said defendant's plea to the jurisdiction of this court, overruled said motion, to which action of the court the defendant then and there excepted. And thereupon

twenty-five veniremen having been sworn on voir dire, and having been examined and found free from exception the parties proceeded to exercise their respective rights of peremptory challenge, which resulted in leaving for service as jurors in this case the following: W. W. Barrett, C. C. Myers, C. C. Campbell, R. A. O'Brien, Cary Carson, H. T. Witt, Charles H. Bell, J. E. West, R. A. Dowdy, Ashley Snead, Wm. A. Mann, and C. H. Evans. And thereupon the said twelve veniremen were duly sworn as a jury for the trial of this case, and after the opening statements of counsel had been made the examination of witnesses was commenced and continued until the arrival of the adjourning hour of the court, whereupon it was ordered that court stand adjourned until tomorrow morning at 10 a. m.

29 And at another day, to wit: At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Lynchburg, on Tuesday, the 8th day of October, 1907.

Present: Honorable Henry C. McDowell, district judge.

Order as to hearing of evidence, and adjourning jury till next day.

Entered October 8, 1907.

This day came again the United States by its attorney, and the defendant having been set to the bar of the court by the marshal, came also the counsel for the defendant, and came also the same jury as on yesterday; and thereupon the examination of witnesses was continued until the adjourning hour of court; whereupon it was ordered that the court stand adjourned until ten o'clock to-morrow morning.

And at another day, to wit: At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Lynchburg, on Wednesday, the 9th day of October, 1907.

Present: Honorable Henry C. McDowell, district judge.

Order as to further hearing of evidence and of adjournment of jury until next day.

Entered October 9, 1907.

This day came again the attorney for the United States, and the defendant was set to the bar in the custody of the marshal, and the jury also appeared pursuant to their adjournment on yesterday, and having further heard the evidence were adjourned over until to-morrow morning at ten o'clock.

And at another day, to wit: At a regular term of the District Court of the United States for the Western District of

30 Virginia, continued and held at Lynchburg, on Thursday, the 10th day of October, 1907.

Present: Honorable Henry C. McDowell, district judge.

Order as to fully hearing the evidence and arguments of counsel, and adjournment of jury until next day.

Entered October 10, 1907.

This day came the attorney for the United States, and the defendant was again set to the bar in the custody of the marshal, and the jury herein also appeared pursuant to their adjournment on yesterday, and having fully heard the evidence and arguments of counsel, were again adjourned over until to-morrow morning at ten o'clock.

And at another day, to wit: At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Lynchburg, on Friday, the 11th day of October, 1907.

Present: Honorable Henry C. McDowell, district judge.

Order as to verdict of jury.

Entered October 11, 1907.

This day came the attorney for the United States, and the defendant was again set to the bar in the custody of the marshal, and the jury again appeared pursuant to their adjournment, and upon their oath do say: "We the jury find the within-named defendant W. E. Rakes guilty of conspiring as charged, and also guilty of murder in the second degree, and we fix his punishment for said last-mentioned offense at imprisonment in the penitentiary for (15) fifteen years.

"C. H. BELL, *Foreman.*"

Whereupon the defendant, by his attorney, moved the court in arrest of judgment and to set aside the verdict and grant him a new trial; and the court not being advised of its judgment to be given in the premises, takes time to consider thereof, and this case is continued and the prisoner remanded to the marshal.

31 And at another day, to wit: At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Lynchburg, on Tuesday, the 15th day of October, 1907.

Present: Honorable Henry C. McDowell, district judge.

Judgment by the court.

Entered October 15, 1907.

UNITED STATES
v.
WM. E. RAKES. } Indictment 1844.

This day again came the United States by its attorney, and the defendant having been set to the bar of the court by the marshal was

required to show cause why sentence should not be pronounced, and the said defendant having assigned no cause, it is considered by the court that the defendant's motions in arrest of judgment and to set aside the verdict and to grant a new trial, heretofore made and taken under advisement, be and they are hereby overruled. And to this action of the court the said defendant by counsel excepts. And it is further considered by the court that the said W. E. Rakes be imprisoned in the United States penitentiary at Atlanta, Ga., for a period of fifteen years and one day, commencing on the day said defendant is committed to said penitentiary, and that the United States of America do recover of and from said defendant the sum of one hundred dollars fine. And for the collection of said fine a writ of fieri facias, but not a capias pro fine, may issue after ten days from this date, at the instance of the United States attorney.

32 *Motion to vacate judgment.*

Filed October 21, 1907.

The defendant Wm. E. Rakes moves the court to vacate its judgment heretofore entered for the following reasons: That,

1st. The court should have excluded all the evidence.

2nd. The court erred in admitting improper evidence.

3rd. The court erred in excluding proper evidence.

4th. The court erred in entering judgment for the Government upon the special plea.

5th. The court erred in refusing the instructions asked for by the defendant.

6th. The court erred in its instructions given to the jury.

7th. The court erred in overruling the motion in arrest of judgment.

8th. The court erred in not setting aside the verdict as contrary to the law and the evidence.

9th. The verdict is bad in that it finds the defendant guilty of two offenses upon each of two counts in said indictment.

10th. The verdict is not responsive to the issue, and judgment should not have been entered thereon.

11th. The judgment should not have been entered imposing a double punishment upon the defendant.

12. The judgment should not have imposed any penalty or punishment in excess of the finding of the jury.

WALLER R. STAPLES,
Atty. for defendant.

32½ And at another day to wit: At a term of the District Court of the United States for the Western District of Virginia, held at Lynchburg on Monday the 21st day of October, 1907.

Present: Honorable Henry C. McDowell, district judge.

Order overruling motion to vacate judgment entered October 21, 1907.

UNITED STATES
v.
WILLIAM E. RAKES. } Indictment 1844.

This day came again the United States attorney and came also the defendant by counsel, and the latter, for reasons stated in writing this day filed, moved the court to vacate the judgment entered in this case on October 15, 1907, and said motion was argued by counsel. And thereupon it is considered by the court that said motion be and it is hereby overruled; to which ruling of the court the defendant by counsel excepts.

Enter:

HENRY C. McDOWELL.

33 *Defendant's bill of exceptions No. 1.*

Filed December 9, 1907.

In the District Court of the United States for the Western District of Virginia.

THE UNITED STATES
v.
WILLIAM E. RAKES.

Defendant's bill of exceptions No. 1.

Be it known that upon the trial of this cause and upon the issue joined upon the plea filed by the defendant, the said defendant in order to maintain said issue on his part introduced in evidence the indictment in this cause, the following record of the filing thereof, the following certificates from the clerk of the Circuit Court of Patrick County, Virginia, and the evidence found upon pages 1 to 3, inclusive, which is as follows:

(NOTE.—The paging of the stenographic report of the evidence is indicated by the numbers in parentheses.)

34 THE UNITED STATES
vs.
WM. E. RAKES.

Report of testimony introduced on the trial of the issue of fact raised in the plea to the jurisdiction filed in behalf of Wm. E. Rakes.

The defendant offers in evidence the exhibits attached to and filed with the plea to the jurisdiction.

The defendant introduced as a witness P. E. Woolwine.

By Mr. STAPLES:

Q. What is your profession?

A. At the present time practicing law.

Q. Where do you live?

A. At Stuart.

Q. Are you familiar with the signature of Robert N. Clark?

A. Yes.

Q. What official position does he hold?

A. He is deputy clerk of the Circuit Court of Patrick County.

Q. Examine these four papers filed with the plea in this case, and tell us whether or not that is the genuine signature of the deputy clerk of the Circuit Court of Patrick County?

A. It is.

Q. Mr. Woolwine, the first of these certificates relates to the
35 orders that have been entered in the case of the Commonwealth of Virginia vs. Wm. E. Rakes, in the Circuit Court of Patrick County, does it?

A. Yes.

Q. State whether or not of your own knowledge you know the day upon which that certificate was made by the deputy clerk?

A. I do. It was on September 5th, 1907. It was signed in my presence.

Q. Do you know whether or not the Circuit Court of Patrick County is still in session?

A. It was the understanding when I left that the court was to continue. I made application to get a license for a corporation—the Blue Ridge Distilling Company. They employed me to make a motion for license. The judge stated that he would continue the term and come back from Rocky Mount.

Q. About what day?

A. The day had not been set at the time I left. We thought it would be about the 26th or the 27th.

Q. Is or is not the Circuit Court of Patrick County still in session for the August term?

A. It is my understanding that it is, sir.

Cross-examination by Mr. HOGE:

Q. Is it not a fact that since the day you spoke of, the judge of the Circuit Court has held a term of his court in Franklin County?

A. Yes.

Q. Is it not also a fact that the judge is now holding a term of his court in Franklin County?

A. Yes.

36 Q. Do you think it possible for the judge to hold two terms at the same time in different counties?

Objected to by counsel for the defendant.

Objection sustained.

By Mr. MOORE:

Q. Do you know whether or not the juries have been released from service at the August term of the court in Patrick County?

Objected to by counsel for the defendant.

Objection sustained.

J. M. HOOKER, by Mr. STAPLES:

Q. Are you Commonwealth's attorney for the County of Patrick?

A. Yes.

Q. Were you in attendance upon the August term of the court?

A. Yes.

Q. Is that court still in session?

A. It is my understanding that it was adjourned from day to day until the 26th day of September. I am not sure as to the day.

Q. It was past this present day?

A. Yes.

Q. Do you know Mr. C. P. Nowlin?

A. Yes.

Q. Is he present at this time?

A. Yes.

Q. Is he the same person who is the surety upon the bond of Wm. E. Rakes?

A. Yes.

Q. In the State court?

A. Yes.

37 And the Government in order to maintain the issue on its part, offered the following evidence numbered as pages 4 to 43, inclusive, which is as follows:

38 Whereupon the defendant rests.

And thereupon the Government introduced the following witnesses:

SAML. H. HOGE by Mr. MOORE:

Q. Mr. Hoge, what official position do you hold?

A. Assistant United States attorney.

Q. How long have you held that position?

A. From April 6, 1907.

Q. Will you please state the circumstances under which the case of the United States vs. Wm. E. Rakes and others was brought to the attention of the district attorney's office, and when?

Counsel for defendant objects.

Objection overruled and point saved.

A. While the district attorney and myself were attending the United States court at Danville, I think it was on the 8th or 9th of April, 1907, our attention was called for the first time to this offence by Mr. Murray Hooker, Commonwealth's attorney of Patrick County, and, at his request, the United States attorney, Mr. Moore, began an investigation of the matter. Mr. Hooker and several other witnesses were sent before the United States grand jury at Danville, to make an indictment, and at the suggestion of the Common-

39 wealth's attorney, Mr. Moore, the United States attorney, made an application to the Department for a secret-service man to be sent to the locality of this crime to investigate it. Mr. McAdams and Mr. Thomas were placed by the Department in charge of the investigation. They reported to the United States attorney's office at Roanoke, and were directed by the United States attorney

to apply to the Commonwealth's attorney of Patrick for such information as he would be able to furnish them relating to the investigation.

Q. Were any reasons assigned by Mr. Hooker at Danville for the Government taking up this matter, investigating it, and prosecuting the case?

Counsel for the defendant objects.

Objection overruled and point saved.

A. The impression left upon us, I might say——

Objection by counsel for the defendant.

Objection sustained.

A. (Continued.) The substance of what Mr. Hooker said was that the facilities of the United States Government for ferreting out this crime and locating and finding the guilty parties were superior and better than that of the State authorities.

Q. Did you officially follow this case to Patrick County?

Counsel for the defendant object.

Objection overruled and point saved.

A. I did.

Q. What occurred there?

A. There was a preliminary examination of two of the parties, if not three, before the United States commissioner, at which time
40 we frequently conferred with the Commonwealth's attorney of Patrick County, Va., Mr. Hooker.

Q. Do you know whether or not the judge of the circuit court of Patrick County, as well as the Commonwealth's attorney, were present, at least a part of the time, during that investigation?

Objection by counsel for the defendant.

Objection overruled and point saved.

A. I remember seeing Judge Harvey several times at the Patrick court-house while there attending that investigation, and I am very certain that on one of the occasions he was in the court-house while the investigation was going on, though as to that I would not be positive.

Q. You mean as to whether he was in the court room at the time the investigation was going on—do you remember that he sat on the judges stand while a part of this investigation was going on?

A. That is my impression.

Q. What has been the relations existing between the United States attorney's office and the Commonwealth's attorney's office of Patrick County with reference to this case—has it been one in which the two offices were working in harmony or not?

Objection by counsel for the defendant.

Objection overruled and point saved.

A. Yes.

Q. Will you please state whether or not Mr. Hooker, the Commonwealth's attorney of Patrick County had a full and frank conversation with the district attorney's office at Danville in April?

41 Objection by counsel for the defendant.

Objection overruled and point saved.

A. Yes; he did.

Q. Please state whether or not the district attorney's office fully confided to Mr. Hooker in the matter of looking up the evidence and bringing these defendants to trial in the Federal court?

Objection and same ruling.

A. Yes.

Q. Will you please state to the court whether or not Mr. Hooker brought to the attention of the district attorney's office the difficulties and inability of the State authorities of Virginia to obtain the evidence and arrest the defendants?

Objection and same ruling.

By the COURT:

Inasmuch as the witness is a lawyer of long practice and high standing, I can not believe that he will be led by the mere form of a question into stating what is not the fact, therefore, the objection is overruled.

A. Mr. Hooker, the Commonwealth's attorney of Patrick County, in his first interview with the district attorney at Danville, bringing the matter to the district attorney's attention, represented that there were no facilities provided by the State government by which a detective or secret-service man could be sent into the locality to find out who the witnesses were or to ferret out the crime or to find out who the guilty parties were, and that he understood that there were such facilities on the part of the United States Government, and that for that reason he really preferred that the United States Government take charge of the case and find out who the guilty parties were and to prosecute the case. We took charge of the case with that understanding.

42 Q. Now please state whether or not at any time there was any objection to the custody of Wm. E. Rakes by the Federal authorities, or any objection to the trial of the case in this court made by the judge of the Circuit Court of Patrick County, the Commonwealth's attorney of that county, or any other official of Patrick County?

Objection and same ruling.

A. I never heard of any objection before on the part of any of the State authorities.

Q. How long were you in Patrick County at that examination?

A. Three days, I think.

Q. When was that?

A. I think it was some time during the month of July.

Q. How often while you were there did you see Judge Harvey, the judge of the circuit court?

A. I saw Judge Harvey and had several conversations with him.

Q. Will you please state whether you know Judge Harvey intimately?

A. Yes; we were quite friends.

Q. Please state whether or not there was anything on his part that indicated that he objected to this court having the custody of the body of W. E. Rakes or of this court trying the case?

Objection and same ruling.

A. Nothing whatever.

43 Q. Do you know the sheriff of Patrick County?

A. I know quite a number of people in Patrick County, but I do not recall who the sheriff is.

Q. You referred to the secret service agents of the Government being instructed to prepare the evidence in the case. Will you please state how long they were working on the case?

A. I think anywhere from five to seven weeks.

The foregoing question and answer were objected to by counsel for the defendant.

Objection overruled and point saved.

Q. Do you or not know whether the officials named above have, so far as you have been aware, acquiesced in the proceedings taken by the Federal Government in this case up to this time?

Objection overruled and point saved.

A. I think so.

Counsel for the defendant move to exclude the testimony of Mr. Hoge upon the following grounds:

1st. That it is not relevant to the issue joined.

2nd. That it tends in no wise to support the contention of the United States.

3rd. That the rights involved are the rights of a defendant not to be prejudiced by conversations of the Commonwealth's attorney with the officers of the United States or by the action of the Commonwealth's attorney.

By the COURT:

I am of opinion to overrule the objection. It seems to me that the testimony given has some bearing upon the issue joined, and I hold to the opinion that it is a question of public policy, for the

44 rights of the public rather than any right of a defendant that should have the consideration of the court in deciding the issue made on this plea to the jurisdiction.

Not waiving the objection to the testimony of the witness in chief or the motions to exclude the same of the exceptions to the ruling of the court thereupon, counsel for the defense proceeds to cross-examine the witness.

By Mr. STAPLES:

Q. Mr. Hoge, when was the April term of the Federal court at Danville, to which you refer as being the occasion of your conversation with Mr. Hooker?

A. April 9, 1907.

Q. I understand you to say that at that time Mr. Hooker, the Commonwealth's attorney of Patrick County, in substance repre-

sented to you that he desired the district attorney's office and the secret agents of the United States to investigate this case?

A. To prosecute and investigate.

Q. To prosecute and investigate the case?

A. Yes.

Q. Did he make any other representations to you at that time?

A. My recollection is that he gave us all the information he had relating to the offense. I do not of course recall verbatim his statement.

Q. Has the attitude of Mr. Hooker toward the attorney for the United States and its secret agents in any wise changed since that interview in Danville?

A. I can not say what his attitude has been toward the agents. I have no knowledge on that subject.

45 Q. Then the representations which Mr. Hooker made to you and to the district attorney's office in respect to the matters concerning which Mr. Moore has examined you, were made about the 9th of April at Danville?

A. At the April term, I think it began on the 9th of April.

Q. It appears from the record that on the 25th day of March, 1907, a coroner's inquest was held upon the body of Ann Hall, pursuant to which, on the 26th day of March, 1907, W. E. Rakes entered into a recognizance to appear at the May term, 1907, of the circuit court of Patrick County. Did Mr. Hooker or the judge of the circuit court of Patrick County at any time intimate to you that they did not expect to proceed with the case in the circuit court of Patrick County, or that they would surrender the prisoner or abandon the prosecution?

A. Neither of them made any statement to me about abandoning the case so far as I know of.

Q. Then the representations which Mr. Hooker made to you concerning his desire and his wishes as to the course to be pursued by the United States attorney's office and the secret agents of the United States, were made prior to the time when the indictment against Wm. E. Rakes was returned into the circuit court of Patrick County?

A. They were made, I would say, between the 9th and the 15th of April, 1907.

46 Q. And that indictment was returned the 1st of June, 1907.

HENRY E. THOMAS by Mr. MOORE:

Q. What official position do you hold, Mr. Thomas?

A. I am a secret service operative.

Q. How long have you been such?

A. A little over four years.

Q. Will you please state what connection you have had with this case?

A. The first connection I had with it I received a telegram from Washington to report to the district attorney's office and join Mr. McAdams there.

Q. Did you obey that instruction?

A. Yes.

Q. What instructions did the district attorney give you?

A. He gave me instructions to go to Stuart and report to the Commonwealth's attorney there, Mr. J. M. Hooker, and that he would help us and give us all the information he could.

Q. Who was assisting you?

A. Mr. McAdams.

Q. What is his official position?

A. The same as mine.

Q. How did you proceed to carry out your instructions from the district attorney's office?

A. We obeyed those instructions.

Q. Did you report to Mr. Hooker?

A. Yes, we went to his house at night and did not find him at home. We went back the next morning.

47 Q. How long were you and Mr. McAdams engaged upon the case?

Objection by counsel for defendant.

Objection overruled and point saved.

A. About seven weeks.

Q. How often did you see the officials of Patrick County, the Commonwealth's attorney and the judge of Patrick County?

Objection, and same ruling.

A. I saw the Commonwealth's attorney and was in conference with him relative to this case on every occasion I was at Stuart.

Q. How many times was that during the seven weeks?

A. I could not tell you. It was a good many times. I saw the judge and was acquainted with him but never had any conference with him about this case.

Q. You were acquainted with the judge, then?

A. Yes.

Q. What were the relations between you and the Commonwealth's attorney with reference to this case—I mean to ask whether or not they were confidential?

Objection, and same ruling.

A. They were confidential; yes, sir.

Q. Please state whether you conferred freely with him and he with you.

Objection, on the ground that it is leading.

Objection sustained.

48 Q. Has there been any objection made to you by any official, the judge or the Commonwealth's attorney of Patrick County, to the proceedings of the Government officials in the preparation of this case for trial in the Federal court?

Counsel for the defendant object, on the ground that the question is irrelevant; and further, upon the ground that although the judge of the circuit court of Patrick County and the Commonwealth's attorney of Patrick County may have conferred with the witness and

other agents of the United States and utilized their services, yet this would have no tendency to show that the said officials of Patrick County did not intend to prosecute the case under the jurisdiction of the State, but on the contrary would show otherwise.

The objection is overruled and the point saved.

A. None whatever.

Q. What directions, if any, did Mr. Hooker give you with reference to this case, and what was your conversation with Mr. Hooker on the subject?

Objection; overruled and point saved.

A. Mr. Hooker told us when we came there to him where to go to and the men we could depend upon in that community; where we could get a place to stay at night and responsible men, and we had confidential talks time and again there as to the way we were proceeding with the case. He suggested that he did not think the State would spend the money or the time, or could not spend it, to work this case up properly, and that he wanted to see it tried in the United
49 States court, and that he would help us any way he could, and did do it.

Counsel for the defendant move the court to strike out from the record and from its consideration all and several the questions and answers of the foregoing witness which were objected to and which objections were overruled, upon the ground that the evidence was not relevant to the issue.

The court overrules the motion and exception is taken.

Cross-examination by Mr. STAPLES:

Q. Did you swear out the warrant upon which Wm. E. Rakes was arrested?

A. I think Mr. McAdams did that.

Q. Do you know when that warrant was sworn out?

A. I could not tell you the exact date.

Q. Tell us as near as you can.

A. I don't know whether I was there or not.

Q. How could your name be signed to it if you were not there?

A. I think I signed my name to something, but I don't remember about that.

Q. Is that warrant here?

A. Yes; I think it is.

Q. When was he arrested on a capias?

A. Court was in session when we got there, and I think he gave bond there for $2,000, so the Commonwealth's attorney told me, and we swore out another warrant for him. I think Mr. McAdams swore out that warrant.

50 By Mr. GRAVELY:

Q. Did the Commonwealth's attorney of Patrick County, or did the judge of the circuit court of that county, ever inform you that they expected or intended to release Wm. E. Rakes, the defendant

in this case, from appearing in the said circuit court in answer to his recognizance upon the charge of the murder of Ann Hall?

A. No; they did not do that.

E. P. McAdams by Mr. Moore:

Q. What official position do you hold?

A. I am a special employee of the Department of Justice.

Q. How long have you been such?

A. I am an operative of the secret service. For about nine years.

Q. Please state whether or not you were detailed to work upon this case of the United States v. W. E. Rakes et al.

A. Yes; I was so detailed.

Q. Where did you first report for duty?

A. First at Washington and then to you at Roanoke.

Q. What instructions were given you at Roanoke?

A. To report to Mr. Hooker and consult with him.

Q. Did you do so?

A. Yes.

Q. How long were you at work on the case?

Objection overruled and point saved.

A. About six or seven weeks, I think.

51 Q. Do you know where the defendants were arrested?

A. Yes; in Patrick County.

Q. Were all of them arrested in Patrick County; how about Grover Beamer?

A. Beamer was arrested in Hampshire, Illinois, and brought to Stuart by the United States marshal for Chicago.

Q. Do you know where that defendant was first located after he left Virginia?

A. He was located in West Virginia.

Q. Where next?

A. At Hampshire, Ill.

Q. Through whose efforts, what officials, was he traced to West Virginia and then to Illinois?

Objection overruled and point saved.

A. Through the efforts of Deputy Marshal Lester—I think that is his name—and myself.

Q. And what official at the other place?

A. Capt. Thomas I. Porter, our man at Chicago. He is in control of our service of the Chicago district.

Q. While you were at work upon the case in Patrick County, did you or not see Mr. Hooker, Commonwealth's attorney?

Objection overruled and point saved.

A. Yes; I saw him there frequently.

Q. Please state whether or not you conferred with him concerning this case.

52 A. Yes; I advised him as to the progress we made and sought his advice about men and matters connected with the investigation.

Q. How often did you advise with him?

A. At least every time we returned to Stuart, and frequently before going out.

The foregoing question was objected to, and the objection overruled and exception noted.

Q. Please state what was the nature of these conferences?

Objection overruled and point saved.

A. We simply confided to him what progress we had made and asked about individuals, etc., and good places to stop.

Q. Will you please state whether or not Mr. Hooker and the judge of the circuit court of Patrick County, or any other official of that county, have made any objection at any time to the custody of the person of Wm. E. Rakes by the Federal officials, or to his being tried in the Federal court. Has such objection been made to you or any other person to your knowledge?

Objection overruled and point saved.

A. I never heard any objection advanced by any official to our investigating the matter or to our course of procedure. On the contrary, I thought we received encouragement from some.

By the COURT:

The latter part of the answer of the witness, as to what he thinks, is stricken out upon the objection of the defendant.

53 Q. Has there been any objection up to this time by the judge or the Commonwealth's attorney to the custody by the Federal authorities of Wm. E. Rakes that you know of?

Objected to as irrelevant and upon the ground that the prisoner has not been in the custody of this witness, or it is not shown that he has.

The objection is overruled and the point saved.

A. I have heard of no objection advanced by any official.

Counsel for the defendant make the same motion as to this witness, and move the court to strike out the questions and answers to which they have objected and to which their objections have not been sustained.

The motion is overruled and the point saved.

Cross-examination by Judge HAIRSTON:

Q. Where was Wm. E. Rakes when you swore out the first warrant for his arrest?

A. I think we got to Stuart on the very day that he was released from the jail.

Q. What was he released from jail for?

A. I suppose it was in connection with this offense.

Q. Was he not released on bond by the State authorities to appear back there to answer the indictment?

A. I think so.

Q. Then, after his release you arrested him on the warrant sworn out by the United States authorities?

A. Yes.

54 Q. For what offense?

A. Illicit distilling.

Q. Had you been at work aiding the Government in finding evidence in the illicit distilling case, or for conspiracy and murder?

A. This warrant was sworn out on information and belief.

Q. That don't answer my question. How long had you been at work on this case when you arrested him for illicit distilling?

A. I had just arrived at Stuart.

Q. You then swore out a warrant against him for illicit distilling before any investigation of this case?

A. Of this case; yes.

Q. What became of the warrant upon which he was arrested for illicit distilling?

A. I don't know, it was never prosecuted.

Q. You then swore out a warrant but never prosecuted it?

A. I was somewhere else, I think, when this case was called.

Q. Was not the warrant that you swore out for him a mere pretext for his arrest, to which you paid no attention afterwards?

A. I had information that he had violated the law in that particular.

Q. Was he remanded to jail under that warrant that you did not see proper to pursue that night?

A. I think he was arrested about one week later on a capias from this court.

55 Q. Was not he remanded to jail under the warrant that you swore out against him for illicit distilling that night, and put back in jail?

A. No; my recollection is that he was released on $5,000 bail to appear the next Saturday.

Q. What was the $5,000 bail given for?

A. Illicit distillation, I think. When he came the next Saturday he was arrested on a new warrant. I think it was the next Saturday.

Q. In pursuance to that recognizance to answer the $5,000 bail for illicit distilling, do you know if he appeared on the next Saturday?

Answer. Yes; he appeared.

Q. Was he tried on that warrant?

A. I think not.

Q. What was done with that warrant when he appeared next Saturday?

A. It might have been dismissed; I don't know.

Q. Did you rearrest him the following Saturday?

A. He was arrested on a capias, I think.

Q. A capias issuing from this court for this charge?

A. Yes.

Q. Is it not a fact that the first warrant you swore out against Rakes was a pretext that you might get him back there to have the chance to arrest him?

A. There was no pretext so far as a violation of the law was concerned.

Q. Was he not tried and acquitted on that charge?

A. I don't think so.

Q. Why did you dismiss it?

A. I don't know what has become of it.

56 Q. Who swore out that warrant?

A. I think I did. Maybe Mr. Thomas and I jointly.

Q. Upon what information?

A. We had information; I think one witness was Peter Hall.

Q. Was not that after he had been indicted in this case at Danville?

A. I really don't know anything about that.

Q. Didn't you just tell the court that you got a capias——

A. You mean indicted for murder?

Q. Yes.

A. Oh, yes; it was after that. He had been indicted and released on bond. I really don't know whether he was indicted or not; it might have been from the commissioner——

Q. You have stated that you had frequent conferences with Mr. Hooker. Do you mean by that that you had frequent conferences with him in regard to your work up there?

A. Yes.

Q. He would tell you the good men and where you could stay?

A. Yes; we advised with him freely.

Q. And there was no objection, so far as you know, from Mr. Hooker or the Judge, to your working up the evidence?

A. No.

57 Redirect examination by Mr. MOORE:

Q. Were you present in Washington when you received the verbal instructions as to the class of work you were to do in southwest Virginia?

A. Yes.

Q. What class of cases did these instructions cover?

A. All violations of the revenue laws.

By consent of counsel the order made on the finding of the indictment against Wm. E. Rakes at Danville is to be considered a part of this record.

And thereupon the Government rests.

By the COURT:

Gentlemen, I am not satisfied to decide this issue on the testimony that I have heard, and inasmuch as Mr. Hooker, the Commonwealth's attorney of Patrick County, is here present, I will of my own motion call him to the stand and ask him for information that I think the court should have.

It is agreed by counsel that at the conclusion of the examination of Mr. Hooker by the court, that counsel for either side may move to strike out any portions of his evidence with the same effect as if the objection had been made at the time the questions were made and answered.

By the COURT:

58 Mr. Hooker, I learn of course from the record of the circuit court of Patrick County, introduced with this plea to the

jurisdiction, that no nolle prosequi has ever been entered of the indictment found in that court against Wm. E. Rakes, and I am consequently of opinion that that court has not abandoned its right or power to prosecute on said indictment. I do desire, however, to have from you, if within your knowledge, any facts which have a tendency to either prove or disprove the contention that the seizure of the body of Wm. E. Rakes by the Federal officials, and the proposed trial of the said Rakes in the Federal court on the charge of conspiracy and murder have been and are with the acquiescence of yourself and the judge of said court. And further, the fact as to the contention that you and the said court acquiesced in the seizure and detention of the said Rakes and in its effect in preventing his bondsman from producing him in the said Patrick court on the first day of the August term?

A. About a week after the murder of Ann Hall, and after the holding of the inquest and the preliminary trial of Wm. E. Rakes before the justice of the peace, one of the revenue officials of Patrick County, I think A. H. Staples or J. W. Staples, came to my office with a letter from Col. Chapman, I think, revenue agent, in which it was stated that the district attorney of this district had asked him for some information, or to attempt to get some information, about the murder of Ann Hall. It occurred to me that I could get from the United States Government what I could not get from the
59 State government, and that was means and facilities and money to find the perpetrators of this crime and bring the perpetrators to justice. I thereupon wrote Mr. Moore, the district attorney, a letter. This letter was written somewhere along about the first days of April, about the matter, telling him that I had seen a letter from Col. Chapman, and that I had information that he wanted to know something about this, and told him, I think, that I would like to confer with him about it and take the matter up with him or something to that effect. Then I was in Roanoke on April the 4th and called Mr. Moore over the phone and was told by some one at his house that he was out of town. I don't think I ever got any reply to my letters to Mr. Moore, but at the April term of the Danville court, I believe, I was summoned before the grand jury about this matter, the killing of Ann Hall. At any rate I was at Danville and there had a talk with Mr. Moore and Mr. Hoge about it. The case was discussed quite lengthily among us and I represented to those gentlemen that the State had but a little fund to aid the State authorities in catching fugitives from justice and ferreting out crime. I think I also stated to them—if I did not it is a fact—that I had just at this time applied to the governor of Virginia for help and he had agreed to give me $50.00 on condition that the county of Patrick would put up $50.00 to aid in the capture of Grover Beamer and possibly to find out all the parties implicated in this killing. As I say, the matter was discussed pretty fully among us three gentlemen, and I know that the gist of my statement to those gentlemen was that we needed help, that the Commonwealth's attorney and
60 the State and Patrick County needed assistance and I wanted

them, and I so wrote Mr. Moore, to get them to send me some Government officials, or to send to Patrick County some Government officials that would hunt out this matter and that would be paid by the Government.

Another matter discussed by us was the fact that the United States did not have to stop at State lines; that they did not have to stop to get requisitions and that kind of thing.

As to the question of where the matter would be tried, I think it was discussed between us. I think Mr. Hoge and I, that the case was discussed as to where it would be tried; and I don't recollect that any agreement was reached about it. In fact I am absolutely certain that nothing definite was said at that time as to where it would be tried, but I remember that it was understood, as I understood, and I presume they understood it the same way, that it was not so much a question with us of jurisdiction as it was of catching people who had committed a horrible crime and having them properly punished for it. I heard no more as I recall of the United States connection with the matter until about the first of June. I locate the time because it was during our May term of the court. It was the last days of May or the first days of June Mr. McAdams and Mr. Thomas appeared at Stuart and called on me, I think it was in the early morning that they came to my office. They told me that they had been sent by District Attorney Moore to me, to, in substance, begin an investigation of the murder of Ann Hall. I told those gentlemen
I was glad to see them and that they should have my coopera-
61 tion in investigating it. I told them the directions to the
Charity neighborhood. I gave them the names of responsible people in that community, men who could be trusted and believed, and so on. I don't recall what all passed between us in the matter. Frequently these gentlemen returned to Stuart, and would talk to me about the result of their efforts and investigations, and would ask my advice about people with whom they had talked, as to their reliability, etc. These conferences continued off and on as long as they remained there investigating this matter. That is about all that I know of in connection with those gentlemen that it is essential to state. If the court would like for me to state my dealings with the case?

The murder of Ann Hall was reported to me by telephone I think on the last Monday in March—on the 24th or 25th, I think the 25th.

Mr. Rakes, as I recall, Wm. E. Rakes, came to the May term of the Patrick Circuit Court to answer a recognizance given before the justice to appear before the grand jury at that term, and I think while there was arrested by Deputy Marshal Staples on a capias. I am not speaking of my own knowledge; that is my understanding. I think that Mr. Staples arrested Mr. Rakes on a capias on the first day of the May term, but as I said, I am not absolutely sure; this is my information; which was Tuesday. That some time during the week the grand jury returned an indictment against Mr. Rakes for the murder of Ann Hall, and on the first day of June, which was still

during the May term of the circuit court of Patrick County, Mr. Rakes gave his bond before the circuit court of Patrick County
62 for his appearance at the next term.

By the COURT:

Q. The first day of the next term?

A. I think so. That was the August term, 1907. Before the August term no effort was made by the Commonwealth, and so far as I know or believe by the defendants, to prepare for a trial of Wm. E. Rakes at the August term, 1907, of the circuit court of Patrick County. At the August term the case against Rakes was on the docket and when called by the clerk, I think it was just passed or continued, I don't remember that anything was done in the matter. I remember that the case was called and some statement made about it by some of us.

Q. Can you recall what you said to the court on the subject?

A. I could not recall, but I know that the substance of it was that the case was just passed because of the fact that the Federal Government had taken charge of the case, as I understand it, and the matter was just merely passed and there was no motion on my part as Commonwealth's attorney for the forfeiture of his recognizance, and I don't recall that anything was said about his renewing his bail bond. I did not think that any importance attached to what they did there at that time, and consequently paid very little attention to it, not thinking that it would be at all necessary for me to remember it. I believe that is all I can tell you or know about it.

Q. It has been argued that there was such acquiescence by yourself and Judge Harvey in the caption and detention of W. E. Rakes, which prevented his answering to his bond on the first day of
63 the August term, as waived and ended the obligation of his surety. Please state any fact that you know bearing on this contention.

A. I can not any more than I have already stated. I have stated in sum and substance my conduct in connection with the case. As for Judge Harvey, I know of nothing that he said or did at the August term of the court about the matter, except as I have stated, and that was just passed or continued, I don't remember which was done.

Q. If you have not done so, please read the replication of the Government, and state any fact or facts which you have not already stated, if there be anything within your knowledge, which tend to support or rebut the said allegation.

A. I think possibly here is a matter that is stated, I don't know how material it is. I notice this plea states that it was apparent to the Commonwealth's attorney of Patrick County, etc. The matter being a Federal question did not occur to me until this letter was brought to me by Mr. Staples. Then it occurred to me that I could get help from the Federal authorities and that is why I took the matter up with the district attorney.

Q. In the replication it is said that at the request of the aforesaid State officials—meaning the Patrick County officials charged with

the duty of prosecuting and trying said W. E. Rakes on the charge of murder in the court of said county—the Government, meaning the United States Government, took cognizance and jurisdiction of the case. Please state whether this allegation is true or not.

64 A. I don't think that at any time did I request the United States authorities to take jurisdiction of the case, but I did earnestly request them to furnish me with officials, if it was in their power, to help find out the guilty parties. There was some correspondence between Mr. Moore and myself about this case later along, about the question of bail for W. E. Rakes. It had been discussed between Judge Hairston, of counsel for the defendants, and myself, in my office at Stuart, and as well as I recollect, Mr. Moore wrote me for my view of the amount of bail the Government should ask for Rakes, and in the letter stated that he supposed I would control the State part of it, and he the Federal part of it, or something to that effect. The letter is dated May 22nd.

Counsel for the defendant announce that they do not desire to question the witness, and move to strike out his testimony as irrelevant. Which motion the court overrules and exception is noted.

Examination by Government counsel:

Q. It is stated in the replication to the plea "that no objection has ever been made by any of the State officials (meaning the judge and the Commonwealth's attorney of Patrick County) or of the court authorities of Patrick County, to the custody of the person of W. E. Rakes, nor to the jurisdiction of this court." Is such the fact?

Objected to by counsel for the defendant on the ground that it is irrelevant.

65 By the Court:

While the mere fact that there has been no objection to the custody of the person of said Rakes and of the assumption of jurisdiction by the Federal court is not by any means conclusive of the question, it seems to me it has at least some bearing upon the inquiry before the court, and the objection is therefore overruled.

A. It is a fact so far as I am concerned. I have discussed the question with Judge Harvey, I think it was on one occasion in court at the May term of the court. Judge Harvey, I think it was, when the case was called and continued, stated that he did not know that the fact that the United States authorities had hold of him would prevent my also prosecuting him in the State courts, or proceeding against him there. That remark I think was elicited from the judge by some statement from me about the case being, or having been, taken charge of by the Federal Government. I have talked with him about the case at other times, but it was in a casual way, and nothing that he said about it was, so far as the jurisdiction of the court is concerned; nothing was said about that so far as I recall. I think that is all that was said about it, and I think that was at the May term when the question of bail was up.

Q. Has Judge Harvey at any time in any of the conversations you have had with him expressed, in words or otherwise, any objection

to the custody of the person of Wm. E. Rakes by the Federal authorities, or to the trial of the case in the Federal courts?

Objection overruled and point saved.

A. He has not. I will say that the matter was never
66 discussed any further than I have mentioned, that I recall.

Q. You were requested by the court to read the replication of the plaintiff to the plea. You did read the same and made explanation with reference to it being apparent to the Commonwealth's attorney of Patrick County that a Federal statute had been violated. Have you any further explanation of said replication to make?

A. I don't recall, Mr. Moore, how much of the replication I have gone over in my statement already made. If there is any other explanation you would like to have me make I will be very glad to do so.

Q. The question I meant to ask you is this: Is there any untruthful statement of fact contained in the replication?

Objection, and sustained.

Q. Assuming that you have read the replication, it is stated at page 5 that "all of the facts above enumerated have been with the knowledge, approval, and acquiescence of all of the aforesaid State officials of Virginia, including the judge and the Commonwealth's attorney of Patrick County." Please state whether or not that recital in the replication is true.

Objection sustained.

Q. It is stated in the replication at page 5 that "at said term (meaning the August term, 1907, of the Circuit Court of Patrick County) the said judge and other officials of said county court treated the case (meaning the case of the Commonwealth of Virginia vs. Wm. E. Rakes) as one not for trial in that court." Is
67 that a fact?

Objection sustained.

Q. Did the county of Patrick put up fifty dollars additional reward as you requested it?

Objection overruled.

A. It did not. I don't think I ever requested it. In fact, I am sure I did not request the county of Patrick to put up its fifty dollars.

Q. What were the relations existing between the Commonwealth's attorney's office of Patrick County and the United States district attorney's office with reference to the handling of this case?

Objected to on the ground that it is irrelevant.

Objection overruled and point saved.

A. They were harmonious, and they cooperated with a view to ascertain the guilty parties and convict them. That was my view, and I am sure it was the district attorney's.

Q. Did you have any preference in your work with the district attorney as to the place of trial of the cases, whether in the Federal or the State court?

Objection overruled and point saved.

A. I understood, and I think that was understood by Mr. Moore, Mr. Hoge, and myself, when we first discussed this case in Danville, that we could afterwards—that there could be no conflict, that we would not fall out about where the case was tried. The main object in view, and I believe on the part of these other gentlemen, was to get justice done, I have always been under the impression since the matter came up that the Federal court had jurisdiction in the
68 matter if they cared to exercise it. I thought if they tried the case that I would render them any service just as cheerfully as they would render it to me if it was tried in the State courts.

Q. As I understand, then, Mr. Hooker, you were under the impression that it was in the power of the Federal court to decide which court should try the case?

A. I did. I thought if they should care not to try it here that they would have rendered me a very valuable service in having worked up the evidence.

Q. If your right to try Wm. E. Rakes in the State court is paramount to the right of the Government to try him in the United States court, do you wish to surrender any of your rights, or do you wish to try him in the State courts?

A. If this court holds that the State court has jurisdiction instead of the Federal court, why of course I should prosecute him with all the power that I know how, and shall ask the aid of the Federal Government to help me at home.

Counsel for the defendant move the court to strike out all the answers of the witness and the questions put by counsel for the Government to which they have objected and which have been overruled.

The court overrules the motion and the defendant excepts.

69 Cross-examination:

Q. Now, while you and Mr. Moore have acted harmoniously in discussing this case and having the evidence worked up, have you in any way abandoned your right to try Rakes in the State courts, provided your right is paramount to any other jurisdiction?

A. I have never contemplated for a moment that if the Federal courts dismissed the case or decided that they were without jurisdiction and did not care to prosecute the case, but what I would prosecute it in the Circuit Court of Patrick County.

Q. Have you or not been hindered and delayed in the prosecution of this case because of the Federal authorities having Wm. E. Rakes in possession?

A. It is possible that I may have started them after Wm. E. Rakes, and I don't know that I ought to say that they have hindered and delayed me, because if the Federal authorities had not taken charge of it I would have had a trial of it before now. I would have pressed for a trial, but since the Federal authorities had charge of it I have not attempted to have a trial in the Circuit Court of Patrick County.

70 By the COURT:

Q. Mr. Hooker, you have heard me read to counsel in this case a part of the opinion in In re Fox, 51 Federal, at page 430, and my own opinion on the question of law involved in the trial now being had is that if you as Commonwealth's attorney of Patrick County feel that in proceeding with the trial of Wm. E. Rakes in this court, this court will be guilty of invading the jurisdiction of the State court, or of an affront to its dignity or of depriving it of the right to try the case against Rakes in that court; or that by so proceeding in this court this court will be preventing you from performing a duty that you desire to perform in behalf of the State court, upon such fact being made to appear to this court, however informally, it shall be the duty of this court to hold that it has no jurisdiction of Wm. E. Rakes and to release him. Will you now kindly state your attitude as Commonwealth's attorney with reference to said matter? To put it otherwise, Mr. Hooker, if you feel that your duty as Commonwealth's attorney calls on you to make a motion in this court to the effect that it do not proceed further with the trial of Wm. E. Rakes and that he be released from the custody of the marshal, in order that you may proceed with a prosecution against him in the State court, my opinion is that this court should not proceed with this trial. If, however, you do not desire or feel constrained to make such motion, then I feel that there would be no breach of comity in proceeding with said trial, and that the judgment on the plea should be against the defendant.

Counsel for defendant, Mr. W. R. Staples, objects, and states his objection as follows:

Counsel for defendant taking the position that the Commonwealth's attorney of Patrick County, representing but one party to the
71 proceeding in that court, has no more right to exercise an election of jurisdiction than has this defendant, and that the answer of the witness can in no wise affect the prior jurisdiction of the State court; therefore the question is irrelevant and improper.

Objection is overruled and point saved.

At this point in the examination the witness asked for a conference with the district attorney, which was allowed without objection.

Answer to above question: In view of the fact that the question of conflict of jurisdiction between the State and Federal courts in this case had never occurred to my mind until I came to this court, and as I had never discussed the matter with the judge of the Circuit Court of Patrick County, I will state that I am not prepared now and do not feel justified in answering the question until I have had an opportunity to know the views of the said judge of the Circuit Court of Patrick County. I will state, however, that if the court will excuse me, I will go to see his honor, the judge of the said circuit court, and after a conference with him will either decline to make the motion or make the motion, and will so inform this court. I feel that this is the proper course for me to pursue as the official of the Commonwealth of Virginia, as well as the proper courtesy to show

to the judge of the Circuit Court of Patrick County, the jurisdiction of whose court is involved in the matter now before this court.

By the COURT:

In view of the statement made by Mr. Hooker, I shall give him an opportunity for the conference he desires, and will not under-
72 take to decide the issue now being tried until he shall have been able to return.

Counsel for defendant moves to exclude the foregoing testimony of J. M. Hooker. Court overrules the motion. Exception, and point saved.

S. A. Thompson (witness for Government).

Questions by DISTRICT ATTORNEY:

Q. What is your official position?

A. United States commissioner.

Q. How long have you been such?

A. Since October, 1906.

Q. For what county?

A. Patrick County.

Q. Please state whether or not you were the commissioner who heard the motion for bail of Peach Rakes and others on or about the 15th of July.

A. I am.

Q. Will you state whether or not Judge Harvey and Mr. Hooker were present during the greater part of that time?

A. It is my recollection that they were.

Q. How long did the examination last?

A. About two days.

Q. Were you present at the August term of the court—the Circuit Court of Patrick County?

A. I was.

Q. What occurred with reference to the case of Commonwealth v. W. E. Rakes?

A. When that case was called Mr. Hooker, the attorney for the Commonwealth, remarked to the court in substance that the United States court had charge of that case, and the court remarked, "Very well," or something to that amount.

73 Q. In that manner the case was passed?

A. Yes, sir.

Defendant by counsel moves to exclude the testimony of Mr. Thompson. Motion overruled; point saved.

Cross-examination, Mr. STAPLES:

Q. That court is still in session, is it not, Mr. Thompson?

A. Yes, sir.

Q. Mr. Thompson, did not Mr. Hooker state to the court on the occasion when this case was called that the Federal Government had taken possession of the prisoner and he did not know what he could

do, and that he supposed the case would have to be passed or continued?

A. If he said it in that way, I didn't catch it.

Q. How did you catch it?

A. As I stated awhile ago, my recollection of the matter is that he remarked that the United States court, or Federal court, I don't remember which, has charge of that matter, or something to that effect; and the court remarked, "Very well," and with that the matter was passed and nothing more said about it.

Q. You say you have no recollection of having heard him say that he supposed the case would have to be passed or continued?

A. No, sir.

Q. Were you paying particular attention to the matter?

A. I can not say I was. It was a mere incident in court. I was sitting there by him.

74 The witness, Mr. J. M. Hooker, having returned, his examination is proceeded with.

By the COURT:

Q. Mr. Hooker are you prepared now to answer the question put to you when we adjourned the hearing of this matter?

A. I am, and will say that I do not desire to make any motion that this court surrender the custody of Wm. E. Rakes, or that he be remanded to the custody of the Circuit Court of Patrick County for trial of the case there pending against him. I will further say that I have seen Judge Harvey since Saturday, and have discussed this case with him and the jurisdictional question that has been put up to me, and he stated, and authorized me to state, that he felt that the ends of justice were more desirable to be attained than any jealousy about jurisdiction of courts. I will also further state that so far as I am concerned I feel that I would be breaking faith with the district attorney's office if I in any way interfered with the prosecution of the case against Rakes, pending here; and in view of all the circumstances of the case and after a full conference with Judge Harvey, I feel that it is my duty as Commonwealth's attorney of Patrick County to go on record declining to make the motion to remand.

Counsel for defendant moves to exclude all of the foregoing answer upon the ground—first, that the Commonwealth's attorney has no authority to surrender the jurisdiction of the State court; and second, that the statement made by the judge of the State court to the witness but off of the bench are not the judicial expressions of that court and should not be admitted or considered by this court.

75 By the COURT:

When a question of comity is presented to the court it may be gratifying to the court to know the attitude of the judge of the court supposedly in conflict, but I am rather with the defendant in the idea that this attitude can be legally shown only by an order of such court. To my mind the Commonwealth attorney is the official charged with the duty of asserting the right of the State of Virginia

in the premises here and therefore I will not consider what Mr. Hooker has stated with reference to Judge Harvey's attitude.

The Government objects to the ruling of the court.

By Mr. STAPLES, of counsel for defendant:

Q. Where and when was this conversation had with Judge Harvey?

A. It was at, I think, Hotel Rockymount, Rockymount, Franklin County, Va., on yesterday, September 16, 1907, and in the dining room of that hotel. I can give you the time of day, Mr. Staples, if you desire it. It was somewhere about one o'clock.

Q. Considering the fact that Wm. E. Rakes is a citizen of the State of Virginia and that the prosecution here involves the commission by the said Rakes of an offense under the State law, and that the said Rakes has demanded the right to be first tried in the State court, which first acquired jurisdiction of his person, are you as Commonwealth's attorney and a State officer willing to deny to a citizen of Virginia the right which he demands, and are you willing to waive that right?

A. I do not feel nor believe that in declining to make this motion to remand that I am in any wise prejudicing or jeopardizing any legal rights of the prisoner, Wm. E. Rakes; nor am I prepared to say that it in any wise precludes my right to prosecute him hereafter in the State court if I should think I had a sufficient case against him.

76 And while it may be true that we first got hold of Rakes, the Government has with our knowledge, and I might say approval, certainly acquiescence, proceeded in a very vigorous and earnest way to find out the murderers of Ann Hall, and since they began that the State authorities of Patrick County have ceased their efforts, and if I were to make this motion to remand and it were to be remanded upon that motion, it might result in turning loose upon the people of Patrick County a man that should be punished for crime. I think that the Commonwealth and that the law-abiding people of Patrick County have some rights in this matter as well as the prisoner. I know that the law-abiding people of Patrick County and the right-thinking people everywhere will be satisfied if justice is done these people here in this court or in the courts of the State of Virginia. That is the only desire I have, to see that they are properly tried and p[illegible]erly punished. Knowing this court and its prosecuting officers a[illegible]do, I feel that justice can be done in this court as well as anywhere else. I have not been called upon to waive any jurisdiction but to make or decline to make a motion to remand. I most positively and emphatically decline to make the motion, and as heretofore stated, I am doing this with the full approval of the judge of the Circuit Court of Patrick County.

Counsel for defendant move to exclude the foregoing answer on the ground that it is not responsive to the question and is irrelevant.

By Mr. STAPLES, of counsel for defendant:

Q. In reaching this conclusion are you actuated by the idea, or the opinion, that if this prisoner is acquitted in the State court he

would be turned loose in Patrick County without the right in the United States court to prosecute the case?

Counsel for Government objects to this question.

Objection overruled.

A. I have not thought about that phase of the case. I have not bothered myself as to the rights of the United States Govern-
77 ment, but I have thought possibly that the trial here and the prosecution here would not interfere with my right to prosecute him at home. But let me say here, and I hope my position will be understood, that I do not care to make this motion to remand nor in any way interfere with the prosecution in the United States courts now pending.

By the COURT:

Q. Mr. Hooker, unless I am greatly mistaken as to the law, the effect of a surrender of the person of Rakes by this court to your court would have no other necessary effect than merely to suspend the action against Rakes in this court. Assuming such to be the law, does it change your determination to decline to move to remand?

A. It does not.

Counsel for defendant moves to exclude statements of the witness as to the opinions of the citizens of Patrick County.

Motion is granted.

Government objects to ruling of the court in this respect.
78 And the court certifies that this was all of the evidence adduced upon said issue, and that in the progress of the hearing of said evidence and at the conclusion of the testimony of Mr. Hoge, beginning at page 4 and ending at page 9 of the foregoing evidence, counsel for the defendant moved to exclude the testimony of Mr. Hoge upon the grounds that it was irrelevant, that it tended in no wise to support the contention of the Government, and that the defendant's rights could not be prejudiced by conversations and transactions between the Commonwealth's attorney and counsel for the Government, which motion the court overruled, to which action of the court the defendant by counsel then and there excepted.

Also that in the progress of said hearing the defendant by counsel moved the court to exclude all of the testimony of the witness Henry E. Thomas found on pages 12 to 15 of the foregoing, upon the ground that the same was irrelevant, which motion was overruled, to which action of the court the defendant by counsel then and there excepted.

Also that in the progress of said hearing the defendant by counsel moved the court to exclude all of the testimony of the witness McAdams found upon pages 16 to 19 of the foregoing, inclusive, which motion was overruled, and to which action of the court the defendant by counsel then and there excepted.

Also that in the progress of said hearing the defendant asked of the witness Hooker, the question beginning at the bottom of page
79 23 and running through the greater part of page 24 of the foregoing, which was followed by the answer immediately following on pages 24 to 28, inclusive, and the court thereupon asked

other questions contained on pages 28 to 30 of the foregoing, which questions and answers the defendant by counsel then and there moved the court to exclude from its consideration on the grounds that it was irrelevant, which motion the court overruled, to which action of the court the defendant by counsel then and there excepted.

Also that at the conclusion of the testimony of Mr. Hooker, which is found upon pages 23 to 34 of the foregoing, counsel for the defendant moved to strike out all of the said testimony, which motion the court overruled, to which action of the court defendant by counsel then and there excepted.

Also that upon the progress of said hearing the court asked the question found on page 36, which is answered on page 37 of the foregoing, which counsel for the defendant moved the court to exclude from its consideration, which motion the court overruled, to which action of the court defendant by counsel excepted.

Also that in the progress of the hearing on said issue, the witness J. H. Hooker returned into court, and the question found on page 40 of the foregoing was propounded by the court, which was answered by the witness. The defendant by counsel moved the court to exclude from its consideration the said answer, which motion the court overruled, to which action of the court the defendant by counsel then and there excepted.

80 Wherefore, inasmuch as the matters herein set forth do not otherwise appear of record in this cause, the defendant tenders this his bill of exceptions No. 1, and prays that the same may be signed and sealed, and all and several the points therein set up be saved to him, which is accordingly done this 9th day of December, 1907.

HENRY C. McDOWELL (SEAL),
District Judge.

[NOTE.—The indictment and record of the filing thereof referred to in the first clause of the foregoing bill of exceptions is copied on pages 1 to 7, inclusive, of this transcript.

The certificates of the clerk of the Circuit Court of Patrick County, Virginia, also referred to in said bill of exceptions, are found on pages 17 to 18, inclusive, of this transcript.]

81 *Defendant's bill of exceptions No. 2.*

Filed December 9, 1907.

In the District Court of the United States for the Western District of Virginia.

THE UNITED STATES
v.
WILLIAM E. RAKES.

Defendant's bill of exceptions No. 2.

Be it known that upon the trial of this cause after the jury had been empanneled and sworn, counsel for the Government, in his open-

ing statement that one Grover Beamer had been jointly indicted with this defendant, tried in this court, found guilty by a jury, and that sentence had not been pronounced upon him, and that he would introduce said Beamer as a witness in this case. To which statement the defendant by counsel excepted, and moved the court to instruct the jury that such statement was improper, whereupon the court made to the jury the following statement:

Inasmuch as the district attorney has stated that he would introduce Grover Beamer as a witness, I find no impropriety in the statement made by the district attorney, other than the statement to the effect that the last trial held under this present joint indictment resulted in a verdict against Grover Beamer. I now therefore say to the jury that they are not to regard the said fact, and are not to determine this case by what some other jury has seen fit to do with regard to Grover Beamer.

To which statement of the court in response to the motion of the defendant, the defendant by counsel then and there excepted.

Whereupon the Government in order to maintain the issue
82 upon its part, introduced the following evidence enumerated as pages 45 to 195 and as pages 238 to 249 of the following, which is all of the evidence introduced by the Government to maintain the issue on its part.

Also that at the conclusion of the testimony of the Government, the defendant by counsel moved the court to exclude all of the evidence of the Government, and to direct a verdict for the defendant upon the ground that it is not sufficient evidence to make out a prima facie case of a conspiracy by two or more persons with intent to intimidate any person from or on account of the exercise of any of the rights secured to him by the Constitution or laws of the United States, which motion the court overruled, to which action of the court the defendant by counsel then and there excepted.

Whereupon the defendant, in order to maintain the issue upon his part, introduced the evidence found on pages 197 to 237 and from pages 249 to 266 of what follows:

83 THE UNITED STATES *vs.* WM. E. RAKES. | Violation of sections 5508 & 5509, U. S. Revised Statutes.

By the COURT:

The district attorney, in opening to the jury, stated the fact that Grover Beamer had been heretofore in this court found guilty by a jury and that sentence has not been pronounced upon him and that he would introduce Grover Beamer as a witness in this case.

Thereupon defendant's counsel, interrupting the opening statement, moved the court to instruct the jury that it was improper to have the fact that a jury had found a verdict against Grover Beamer stated to them.

Thereupon the court charged the jury in substance as follows: Inasmuch as the district attorney has stated that he would introduce Grover Beamer as a witness, I find no impropriety in the statement made by the district attorney other than the statement to the effect that the last trial held under this present joint indictment resulted in a verdict against Grover Beamer. I now, therefore, say to the jury that they are not to regard the said fact and are not to determine this case by what some other jury has seen fit to do with regard to Grover Beamer.

To this ruling the defendant by counsel excepts and saves the point.

Counsel for the Government and for the defendant having concluded their opening statements to the jury, the Government thereupon introduced the following testimony:

84 PETER HALL by Mr. MOORE:

Q. Where do you live?

A. I live at Stuart, now.

Q. How long since have you been living at Stuart?

A. Ever since about the last of March.

Q. Where did you live prior to that time?

A. I lived in the Charity neighborhood in Patrick County.

Q. How far is that from Stuart?

A. I think it is called 21 miles, some say 25.

Q. With whom did you live in that neighborhood?

A. Aunt Ann Hall and Aunt Jane Hall.

Q. Do you remember the time that your Aunt Ann was shot and killed?

A. It was the fourth Sunday night in March, I think.

Q. Where were you the day before she was killed?

A. I was there and at Sam Hall's.

Q. At Sam Hall's?

A. Yes.

Q. Is that Mrs. Elizabeth Hall's home?

A. Yes.

Q. So then on Suday before she was killed you were at your Aunt Ann's and also at Miss Elizabeth's?

A. Yes.

Q. Where were you the night that she was killed?

A. I was at Aunt Martha Thomas's.

Q. How far was that from there?

A. About eight miles I reckon.

85 Q. Do you know Wm. E. Rakes, one of the defendants here?

A. Yes.

Q. What do you know about his distillery being reported to the Government officials?

A. I reported it.

Q. When?

A. It was just a short bit before Christmas.

Q. How long before the Government officers destroyed it.
A. I do not remember exactly, something like a week.
Q. Was that Christmas of last year that you refer to?
A. Yes, sir.
Q. Where was that distillery located?
A. Right above old man Aleck Rake's, about two miles from Charity.
Q. Was that a bonded distillery or a blockade distillery?
Counsel for defendant objects, on the ground that the question calls for a conclusion on the part of the witness.

By the COURT:

He can tell whether or not it had the sign required by law.
Q. Tell the jury whether there was a sign "Registered Distillery" posted in great big letters?
A. I could not say, I have never been real close to it.
Q. What became of that distillery?
A. It was destroyed by the Government officials.
86 Q. You reported it, then, about a week before the Government officials destroyed it?
A. Yes.
Q. About when did they destroy it?
A. I don't remember exactly; believe it was just about a week before Christmas.
Q. What Government officials destroyed it?
A. E. Parr, A. H. Staples, J. W. Staples; that is all the Government officials there was.
Q. Where were you when it was destroyed?
A. I was at home that night, stayed there, and met the officers next morning at Charity.
Q. Whom did you see at Charity the next morning besides the officers?
A. A fellow named Webb——
Mr. MOORE. I withdraw that question, because it is another visit.
Q. Tell the jury whether you ever saw Wm. E. Rakes at that distillery?
A. Yes; I saw him there.
Q. How long was that before you reported it that you saw him there?
A. Once, it was about a week, and then I saw him just a day or two before they went. I don't remember just exactly the day.
Q. Do you know Grover Beamer?
A. Yes.
Q. What do you know about his running a distillery?
A. I saw him at one, and reported it.
Q. Where was that distillery located?
A. About a mile above Charity, on Nowlin's land.
87 Q. On what Nowlin's land?
A. C. P. Nowlin.
Q. What relation is he to Wm. E. Rakes?

A. They are brothers-in-law.

Q. When did you report that distillery?

A. I don't remember what month it was; I met Mr. Staples when he was coming from Roanoke court.

Q. How long after you reported it to Mr. Staples was it before it was destroyed?

A. I don't exactly remember, but it seems to me it was about a week.

Q. Where were you when the Grover Beamer distillery was destroyed?

A. I was with the officers when they destroyed it.

Q. What officers?

A. A. H. Staples, Harry Lawson, Hansbrough, and Captain Gee.

Q. Where did you get with the officers?

A. They come to Aunt Ann's house.

Q. What time of night was that?

A. About three o'clock, I think.

Q. In the morning?

A. Yes, sir.

Q. Where did you go to from your Aunt Ann's house?

A. Up by Charity to Beamer's distillery.

Q. How far was that distillery from C. P. Nowlin's house?

A. A mile and a half or two miles.

Q. How far from Wm. E. Rakes's?

A. About two miles, I guess.

88 Q. What did the officers do when they got to that distillery?

A. They went in, no one was there, cut up a tub, built a fire, tore out the still, and cut it up, cut up the cap and worm, and then went down below the distillery about 100 yards or a little over and broke into a house searching for liquor.

Q. Where did you go to from there?

A. Down back by Charity to Landon Hall's distillery.

Q. What did you find at that distillery?

A. Nothing but two or three tubs of beer.

Q. Was that the same night?

A. Yes.

Q. How far was the Landon Hall distillery from C. P. Nowlin's?

A. About two miles.

Q. At what time did you get to that distillery?

A. Just a little bit before day.

Q. How long did you stay with the officers that night?

A. I left them just before daylight.

Q. Do you remember what month that was in?

A. No, sir; I don't remember.

Q. How soon was it after you reported it to Mr. Staples as he was returning from Roanoke court?

A. It was about a week before they come, I don't remember exactly.

Q. I understand you to say you know Grover Beamer?

A. Yes.

Q. How long have you known him?

A. We were raised up right together nearly.

89 Q. Where did he live at the time you reported this distillery?

A. He was sometimes at Charley Nowlin's and sometimes at George Roberson's.

Q. Where was he the night, or the morning, that the distillery was cut up?

A. The officers said——

Q. Tell the jury whether or not you were paid as a Form 10 man for the information you gave with reference to these distilleries?

A. I got ten dollars for Beamer's and ten dollars for Rakes's and for Landon Hall's I didn't get anything.

Q. You did not get the distillery at that place?

A. No, sir.

Q. I show you what is known as Form 10, or an authenticated copy thereof, being a receipt for ten dollars paid you by Revenue Agent Chapman for information in destruction of distillery on the 15th of December. Please tell the jury whether or not you gave a receipt to Colonel Chapman for ten dollars for that fee that was paid you?

A. Yes, sir; I signed a receipt.

Q. Can you read?

A. Nothing more than my name.

By Mr. MOORE:

I offer this receipt, if your honor please, in evidence.

By Mr. STAPLES:

We object to the receipt, on the ground that it is nothing more than the statement of a fact that he has already testified to.

90 By the COURT:

I think it is admissible as accumulative testimony.

Said Form 10 is thereupon read to the jury by Mr. Moore, and is in the words and figures following, to wit:

Form No. 10—Revised. United States Internal Revenue. Receipt to disbursing officer.

Received from W. H. Chapman, internal revenue agt. division of Va., on the 27th day of Dec., 1906, the sum of ten dollars and — cents, being in full for my compensation as informer at the rate of — dollars per —, for the 15" of Decr., 1906, of —, 190–, to the — day of —, 190–, inclusive, and for $—, expenses incurred as per itemized statement.

(Sign) PETE HALL.

I, Pete Hall, — in the 6th district of Va., do certify, on oath, that I have performed the services and incurred the expenses stated in the receipt for $10.00, given this day, for the month of Dec., 1906; that I have received the full sum therein stated to my own use and benefit,

and that I have not paid, deposited, or assigned, nor contracted to pay, deposit, or assign, any part of such compensation to the use of any other person, nor in any way, directly or indirectly, paid or given, nor contracted to pay or give, any reward or compensation for my office or employment, or the emoluments thereof.

I further swear that during the above period neither I nor any member of my family has received, either personally or by intervention of another party, any money or compensation of any description whatever, nor any promises for the same, either directly
91 or indirectly, for services rendered or to be rendered, or acts performed or to be performed, in connection with the internal revenue; nor purchased for like services or acts, from any manufacturer, consignee, agent, or custom-house broker, or other person whomsoever, any goods, wares, or merchandise at less than regular retail market prices therefor.

(Sign) PETE HALL.

Sworn and subscribed before me, this 27th day of Dec., 1906.

E. PARR, D. C.

(Endorsements on receipt.)

Form No. 10. U. S. Internal Revenue. Voucher No. 16.

Receipt of Pete Hall for the month of Dec., 1906, 6th dist. of Va.

This voucher is for services rendered by Pete Hall, informer, with Dep. Coll. Parr, on a raid made in Patrick Co., 6th dist. Va., from — m., Dec. 15, 1906, to — m. —, 190–, at which time the following property was destroyed: One copper still, capacity 85 gallons; 6 fermenters; 300 gallons spent beer; cap & worm, etc. Estimated value $50. Richmond, Va. W. H. Chapman, revenue agent. Dec. 31, 1906.

92 (Certificate of Acting Secretary of the Treasury) United States of America. Treasury Department, July 8, 1907.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of a receipt on Form 10 on file in this Department.

[Seal of the Treasury Department.] In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

J. H. EDWARDS,
Acting Secretary of the Treasury.

S. M. G.

Q. Please tell the jury whether you were paid the fee for reporting the Grover Beamer distillery?

A. Yes; I got ten dollars.

Q. Did you give a receipt for that?

A. Yes.

Q. To Colonel Chapman, the revenue agent?

A. I think I gave it to one of the Staples boys; they had the receipt, and——

Q. So you gave a receipt for $10 for that fee?

A. Yes.

Q. I show you Form 10 for information given on March 6, 1907, and being a receipt for the sum of ten dollars. Does that appear to be the receipt you gave or a copy of it?

A. This seems to be a copy of it, but I don't think that is the one I gave.

By Mr. MOORE:

If your honor please, I offer this.

93 The Form 10 is thereupon read to the jury by Mr. Moore, and is in the words and figures following, to wit:

Form No. 10—Revised. United States Internal Revenue. Receipt to disbursing officer.

Received from W. H. Chapman, agent of internal revenue for the Div. of Virginia, on the 7th day of March, 1907, the sum of ten ($10.00) dollars and — cents, being in full for my compensation as informer at the rate of — dollars per —, for March 6, 1907, — day of 190–, to the — day of —, 190–, inclusive, and for &—, expenses incurred as per itemized statement.

(Sign) PETE HALL.

I, Peter Hall, Charity, Va., in the 6th district of Virginia, do certify, on oath, that I have performed the services and incurred the expenses stated in the receipt for $10.00, given this day, for the month of March, 1907; that I have received the full sum therein stated to my own use and benefit, and that I have not paid, deposited, or assigned, nor contracted to pay, deposit, or assign, any part of such compensation to the use of any other person, nor in any way, directly or indirectly, paid or given, nor contracted to pay or give, any reward or compensation for my office or employment, or the emoluments thereof.

I further swear that, during the above period, neither I nor any member of my family has received, either personally or by intervention of another party, any money or compensation of any description whatever, nor any promises for the same, either directly or indirectly, for services rendered or to be rendered, or acts performed or to be performed, in connection with the internal revenue; nor purchased for like services or acts, from any manufacturer,

94 consignee, agent, or custom-house broker, or other person whomsoever, any goods, wares, or merchandise, at less than regular retail market prices therefor.

(Sign.) PETE HALL.

Sworn and subscribed before me this 7th day of March, 1907.

CHAS. GEE,
Dept. Coll.

(Marginal statement.)

For information which led to the destruction of illicit distillery of Grover Beamer. Informer $10.00.

(Endorsements on receipt.)

Form No. 10. U. S. Internal Revenue. Voucher No. 5.

Receipt of Peter Hall for the month of March, 1907, 6th Dist. of Virginia.

This voucher is for services rendered by Peter Hall, informer, with Dep. Coll. Gee and Lawson, on a raid made in Patrick Co., 6th Dist. of Va., from Mar. 6, 1907, —— to ——, at which time the following property was destroyed:

One copper still, capacity 80 gallons; 17 fermenters; 540 gallons beer; cap and worm bushels mash; 2 flake stand, 2 singling-tub, etc.

95 Estimated value $125.

W. H. CHAPMAN,
Revenue Agent.

RICHMOND, VA., *Mar. 11, 1907.*

(Certificate of Acting Secretary of the Treasury.)

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
September 25, 1907.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed Form 10, dated March 7, 1907, and signed by Pete Hall, is a true and correct copy of the original on file in this Department.

[Seal of the Treasury Department.] In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

J. H. EDWARDS,
Acting Secretary of the Treasury.
M. H.

Q. Charles Gee was one of the gentlemen who was along that night?

A. They call him Captain Gee.

96 The defendant by counsel objects to the introduction of the two last above-mentioned exhibits, on the ground that they were filed as exhibits in the trial of the case of United States v. Grover Beamer.

The court overrules the objection, and point saved.

Q. What time did you leave your Aunt Jane's on the Sunday before your Aunt Ann was killed?

A. About 12 o'clock, I think.

Q. Who were the members of the family at that place, who lived there most of the time?

A. Aunt Ann and Aunt Jane stayed there all the time. I stayed there a part of my time and sometimes Uncle Bill stayed there at Ann's.

Q. One of these stills you say was on Charley Nowlin's land?

A. Yes.

Q. Where did Charley Turner live at the time these stills were cut up and reported?

A. With Charley Nowlin.

Q. So Grover Beamer and Charley Turner both lived with Mr. Nowlin?

A. Charley Turner stayed there all the time, and I don't know whether Grover stayed there all the time or not; sometimes he was there and sometimes he was at George Roberson's.

Q. What was Wm. E. Rakes doing when you saw him at this distillery?

A. He come out and got him a turn of wood.

Q. What else did you see him do?

A. I don't think I saw him doing anything but getting some wood. I could hear him inside at work.

97 Q. What kind of work did he seem to be doing?

A. Seemed like I heard him fill up the still; I could not tell whether it was or not.

Q. It has been stated by counsel here that you were a pretty bad fellow and that warrants had been out for you. Who issued those warrants?

A. 'Squire Woods.

Q. What kin is he to Nowlin and Rakes, Wm. E. Rakes?

A. Brothers-in-law.

Q. What did these warrants charge you with?

A. One had me charged with stealing a pocketbook and some money, and some for trespassing, and one for carrying a gun on Sunday.

Q. Were you tried for the pocketbook business?

A. Yes.

Q. What became of it?

A. They dismissed it, at Nowlin's court.

Q. Who swore out that warrant?

A. Will Rakes.

Q. The defendant here?

A. Yes.

Q. What did some of those other warrants charge you with that they had out against you?

A. Robert Lee had one for trespassing.

Q. What kin is Robert Lee to C. P. Nowlin and Rakes?

A. They are brothers-in-law.

Q. Who issued that warrant?

A. 'Squire Wood.

Q. He is a brother-in-law, too?

A. Yes.

98 Q. What did they do to you on that warrant?

A. Fined me $5 for trespass.

Q. What kind of trespass were you doing?

A. They claimed I was hunting.

Q. What were you hunting for?

A. I was at that time trying to kill a rabbit.

Q. What kind of land was it you were trespassing on?

A. Wood land.

Q. What other kind of warrants?

A. Nowlin got one out; they claimed it was for hunting and fishing together.

Q. What kind of land was that you were trespassing on?

A. Wood land, pretty rough land.

Q. What were you hunting for?

A. A distillery.

Q. Was that Mr. Nowlin's land?

A. Yes.

Q. So he got out a warrant against you for trespass?

A. Yes.

Q. What did they do to you on that warrant?

A. They fined me ten dollars.

Q. Was Mr. Nowlin present at the trial?

A. Yes.

Q. So you were hunting for a still, and he got out a warrant and had you fined ten dollars?

A. Yes.

Q. Were any warrants ever issued for you or not except those that were issued by a brother-in-law of the defendant?

A. Yes.

99 Q. Tell us about it.

A. Tom Tuggle had one or two issued for me, and Emmett Foley had one.

Q. You say you were acquitted about the pocketbook business?

A. Yes.

Q. And on the trespass warrants you were fined?

A. Yes.

Q. What were the other warrants for?

A. Foley's was for trespass. I compromised that. Tuggle's was for shooting a dog, and shooting in the public highway.

Q. So those people up there swore out several warrants against you?

A. Yes.

Q. So you finally left that country?

A. Yes.

Q. How many distilleries have you seen during the last five years on the lands owned by Wm. E. Rakes and Charles P. Nowlin?

Counsel for defendant object, on the ground that it is irrelevant.

By the COURT:

I think the question should be confined to the distilleries known by the witness to be illicit distilleries.

Q. How many illicit distilleries have you seen there on the lands of Wm. E. Rakes and C. P. Nowlin and Robert E. Lee during the last five years?

100 Objection overruled and point saved.

A. I don't remember that I have seen any on W. E. Rakes's land. As to C. P. Nowlin's, I don't reckon there is a branch on his land anywhere that a distillery could be put up but that there has been one.

Q. How about Mr. Lee's land—don't you know of any that have been on his?

A. Yes. There has been one, I think.

Q. How much land does Mr. Nowlin own in there? How many different tracts and how many acres?

A. He owns two tracts; I don't know how many acres; a good large boundary, one of the tracts.

Q. Name some of the places where the still sites are?

A. Down below his house——

Objection overruled and point saved.

Q. I am talking about illegal distilleries now.

A. There was one down below his house about a quarter of a mile, on the river, not exactly below his house.

Q. What kind of a place was it where that was located?

A. A pretty rough place—wood land.

Q. How long since that was there?

A. About a year and a half, I reckon. Then in about a quarter mile there was another one. It was run year before last, I think.

Q. Was that an illegal distillery, too?

A. Yes.

Q. What kind of land was that?

A. Wood land, on the river.

Q. Tell us about some other.

101 A. At the mouth of what they called the Big Branch. I don't know whether that was on his land or Roberson's. There was one there, though.

Q. He is an adjoining landowner?

A. Yes.

Q. Who is he?

A. W. A. Roberson.

Q. Tell us about another illegal distillery within the last five years.

A. There was one in what they called the "Old Flat Field." I don't think it was run since it was cut up and they cut Sam Rakes's and old man Charley Nowlin's there.

Q. How long has that been?

A. Some time ago.

Q. Whose land was that?

A. Charles Nowlin's.

Q. And these are in addition to those you mentioned?
A. Yes.

Cross-examination by Judge HAIRSTON:

Q. Who told you about those other three distilleries that you have mentioned?
A. Didn't anyone tell me about them.
Q. Nobody told you about it at all?
A. I saw them.

By Mr. MOORE:

Q. How old are you, Mr. Hall?
A. I am 17, going on 18.

102 By Judge HAIRSTON:

Q. Were they in operation, did you go to them?
A. Yes; I have been by them.
Q. Did you go to them?
A. Certainly I went to them.
Q. How many were your Aunt Jane's have you been to, those you did not mention?
A. I don't know.
Q. How many have you been to that were her's?
A. Not but one in a long time. It has been cut up and destroyed.
Q. Now, was not the still that you say you saw on Robert E. Lee's land your Aunt Jane Hall's?
A. Some of them used to run one there.
Q. Some of who? Aunt Jane or Aunt Ann, or which?
A. One or other; I don't know which.
Q. They used to run a still on Robert E. Lee's land?
A. Yes; I don't remember how long ago.
Q. How many did you ever go to run by your Uncle Joe?
A. I don't know.
Q. You can not count them, can you?
A. I have been to two or three.
Q. How many belonged to Uncle Bill, who stayed at your Aunt Ann's a while?
A. I don't know as I went to any that belonged to him.
Q. Belonged to him—what?
A. One cut up here some time ago was claimed to have been his. He said that he had a part in it.
Q. Where is Uncle Bill now?
A. In the penitentiary.
Q. For what?
A. For a distillery that was cut up. He stated that he had an interest in it.

103 Q. You say that you had not been to a distillery that was run by your Aunt Ann?
A. Yes; I have been to one that was run by her.
Q. Where was it?

A. In above Charity.
Q. Whose land was that on?
A. I could not say for certain whose it is.
Q. Whose do you think it was on?
A. Ernest Lester seemed to be looking after it.
Q. Didn't they operate a distillery on Charles Nowlin's land, too?
A. No.
Q. They did not?
A. Not as I ever remember of.
Q. Is it not a fact that little shacks are put up on people's land in the hollows and they don't know it?
A. I could not tell you about that.
Q. Where was Aunt Jane operating the distillery last year, last spring, and was tried for it, plead guilty to it—where was she operating that distillery?
A. She was not operating any still last spring as I remember of.
Q. Last spring a year ago.
A. Some time ago, I don't remember.
Q. Where was it then?
A. Down below the house.
Q. On whose land?
A. On hers, I reckon.
Q. Did you report that one?
A. No.
Q. You did not report that?
A. No.
104 Q. She was caught at that?
A. No; she was not caught at it but she plead guilty.
Q. How did that happen?
A. The officers got out a warrant.
Q. They proved it on her, didn't they?
A. No; she just plead guilty.
Q. She was sent to jail for that, wasn't she?
A. Yes.
Q. Where was Aunt Ann making it? Didn't she plead guilty, too?
A. Yes; that is what she said.
Q. How long had she been out of jail when she was shot?
A. About a month.
Q. You had been to your Uncle Joe's distillery several times, had you not?
A. Yes; several years ago.
Q. And your Uncle Bill's, too, hadn't you?
A. I don't know as I had ever been to any of his until they cut up the one over at Buffalo.
Q. You were every one arrested in a blockade stillhouse, were you not?
A. No.
Q. Mr. Moore asked you how many you had been to in the last five years, and how many you had seen. You had not begun to be a reporter until about the middle of last December, had you?

A. I don't remember just when I set in.
Q. What was the first report you made?
A. Wm. E. Rakes's.
105 Q. When was it?
A. Last Christmas.
Q. How many of those warants were sworn out against you before you got to be a reporter?
A. I don't remember that.
Q. You do not?
A. I think they were most all of them but one or two.
Q. How many warrants have been sworn out for you anyway over there?
A. I don't remember that.
Q. But you do know that all of them except one or two were made out before you ever made a report?
A. Yes; I think so.
Q. How is it Mr. Tuggle swore out a warrant against you for trespass?
A. No; I did not say it was for trespass.
Q. What did you say it was for?
A. For shooting in the public highway and killing a dog.
Q. Was it not for shooting from the road into his house and killing a cat or something?
A. No.
Q. Didn't he swear out a warrant against you for shooting a dog that was in the yard playing with some of his children?
A. No; the dog was at the road.
Q. Were his children there?
A. No; there was no one anyways near except Aunt Jane and me.
106 Q. When was that warrant sworn out against you?
A. It has been three or four or five years ago.
Q. Didn't Sam Rakes swear out a warrant against you too?
A. No.
Q. Was it not at Sam Rakes's house that you shot at a cat in the window?
A. No; I did not.
Q. Why did you hesitate about it—what did he have you up for?
A. He has never had me up.
Q. Didn't Sam Rakes swear out a warrant against you—do you say that he never swore out a warrant against you?
A. If he ever did I don't know anything about it.
Q. There have been so many you can not recollect all of them can you?
A. I can by studying about it.
Q. Emmet Foley had out a warrant against you, didn't he.
A. Yes.
Q. What was that for?
A. Trespass.

Q. What sort of trespass was it for, shooting stock?
A. No; it was for hunting.
Q. When was that?
A. Some time last year, I don't remember what time.
Q. That was before you got to be a reporter, wasn't it?
A. It was before ever I had reported any, but I was looking for one then.
107 Q. You were looking for one then. Why were you looking for one?
A. To report it.
Q. Why didn't you go to your uncle Bill's, uncle Joe's or aunt Jane's or aunt Ann's?
A. I guess I would have to wait until they started one.
Q. Why didn't you go to two or three on Charles Nowlin's land?
A. I didn't know of any running just then.
Q. What made you report William Rakes's distillery?
A. Because I wanted to.
Q. Did you not have any other reason?
A. It was against the law for him to run it.
Q. When did you conclude to be a reformer?
A. I don't know when I got it into my head.
Q. Didn't you get it into your head soon after he got it into his head to have you arrested for stealing his pocketbook and money?
A. No.
Q. When did he get out that warrant against you for stealing his pocketbook and money?
A. I don't remember.
Q. That was before you got to be a reporter, wasn't it?
A. Yes.
Q. Didn't Tom Tuggle have you arrested and tried and tracked you up where you had stolen oats and burned them up?
A. No.
108 Q. What was it for?
A. Tom Tuggle never had any warrant except for shooting his dog and shooting in the public highway.
Q. Didn't he catch you stealing the oats—and made you admit that you had stolen the oats?
A. No.
Q. Whose oats was it you stole?
A. Nobody's. I passed by George Nowlin's oat stack one day. I had fell in the creek. I went to the oat stack and made a little fire. There was snow and hail on the ground and it was raining.
Q. That was because you fell in the creek?
A. Yes.
Q. What creek was it you fell in?
A. Rock Castle.
Q. How far was it from George Nowlin's house?
A. I don't know.
Q. Who lived near the creek?

A. George Brammer's was about the nearest one I think.
Q. How far did he live?
A. Something like ½ mile.
Q. Why didn't you go to his house?
A. I just didn't do it.
Q. Why didn't you go to George Nowlin's?
A. I was not traveling that way.
Q. Were there any houses on the road the way you were going?
A. No ways near.
Q. Did you sign that receipt for that reporting for ten dollars?
A. I don't think I signed this one, but I signed——
109 Q. Did you sign any of them?
A. Yes.
Q. In your own name?
A. Yes.
Q. In your own handwriting?
A. Yes.
Q. What made you report Grover Beamer's distillery?
A. Because I wanted to have it destroyed.
Q. Is it not a fact that you reported this distillery because you were mad with W. E. Rakes for having you arrested and causing you and your aunt to pay out some money and costs?
A. No.
Q. Are you friendly to him to-day?
A. I was when he was at——
Q. Still you reported him?
A. Yes.
Q. Were you not mad with him for having you arrested for stealing?
A. I was not in any good humor with him at all.
Q. It made you mad, didn't it?
A. It didn't make me so very mad.
Q. Didn't he and Aunt Jane and a whole lot of them get into a row up there when the warrant was tried, and didn't Aunt Jane threaten to kill him with a pound weight, and a whole lot of row?
A. I don't think I know anything about that.
Q. Were you friendly to Grover Beamer?
A. I was friendly until we had a few words over his cussing Aunt Ann.
110 Q. Did Grover testify against you for carrying concealed weapons?
A. No.
Q. He testified against you in one case didn't he?
A. If he did I don't remember anything about it.
Q. It is a fact, isn't it, that you don't like these people any too well; and aren't you in that fix now?
A. Of course I don't like them any too well.
Q. Didn't you report them because you were mad with them?

A. No, not particularly because I was mad with them.
Q. What kin is Landon Hall to you?
A. I don't know, some kin, though.
Q. They didn't find any "copper" at his place?
A. No, sir.
Q. You made these reports very secretly didn't you—went about fifteen miles across the country and told the deputy marshal about it, didn't you—he was the only one you told?
A. I went about 20 miles.
Q. You didn't go back home in that neighborhood and tell the people you had reported Will Rakes's distillery, did you?
A. No. I might have told one or two after it was cut up, but I never told anyone beforehand.
Q. Did you not testify in this case that you never told anybody but the Staples's?
A. I don't think I have.
Q. Is it not a fact that you kept it very quiet that you were a reporter?
A. I kept it as quiet as I could while I stayed in there.
111 Q. Tell the jury where you were when you saw Wm. E. Rakes at this distillery?
A. I was kind of above it.
Q. In the road?
A. No.
Q. How did you get there, travel the road?
A. No, I traveled the road until I got in about a quarter of a mile of it.
Q. You were hid in the ivy, were you not?
A. I don't remember. I think I was behind a tree lap.
Q. You were hidden, were you not?
A. Yes.
Q. What month was that in that you saw that?
A. I don't remember.
Q. What time of day was it?
A. It was after 12 o'clock.
Q. How far were you from this distillery?
A. About 50 or 75 yards.
Q. Did you see anybody else about there?
A. I did not.
Q. When was that, what month do you say it was in, do you know?
A. No.
Q. Was that the first time you were there?
A. I think I got kind of up to the right of the distillery, sort of on the right of a hill; and the next time I was up the branch.
Q. Which time was it that you saw him come out into the yard and get some wood?
A. The first time. He come out both times.
Q. He came out both times?
A. Yes.

112 Q. Didn't you state that the first time you were there that he came out and got some wood, and that the next time you heard him like he was filling up the still?

A. I don't think I told it that way. I said that I saw him come out, and then I heard him in there.

Q. Was that at the same time?

A. Yes, sir. No, sir. He was outdoors once and in the stillhouse next time.

Q. He was in the stillhouse the second trip?

A. In and out both.

Q. How long before you went back the second time after you had been there the first time?

A. I could not tell you exactly.

Q. How long do you think it was?

A. Something like a week.

Q. The first time you saw him were you certain it was him?

A. I was.

Q. What made you go back the second time?

A. To see who was there and whether he was at work or not.

Q. You have just told the jury he was there, and was taking in a turn of wood. What made you go back the second time if you were positive it was him the first time?

A. I could not get to go to the court-house the first time, and I didn't know exactly how to tell the officers to get in there.

Q. Were you not raised in the neighborhood?

A. In about two miles of there.

113 Q. How far was the road from that distillery?

A. About ¼ mile, maybe not that far.

Q. Could you not give the officers as good a description the first time you went in there as you could the second?

A. I decided there was plenty of time to go back again.

114 Q. He might have stilled out before you went back there the second time.

A. I don't know why it was that I decided that way.

Q. When were you sent to jail for some of this devilment you did over there?

A. It was long about the first of January; I don't remember what day.

Q. What year.

A. 1907.

Q. Are you not mistaken about that?

A. I don't think I am.

Q. Didn't the revenue officers agree to pay your fine if you would inform for them, and get you out of jail.

A. No, I don't think they did. I borrowed some money from Joe Staples and paid it back.

Q. Was not it your understanding with Joe Staples that you should inform on your neighbors to pay him what he had loaned to you?

A. I didn't tell him I would pay it, I just told him I wanted to borrow some money.

Q. How much money did he pay you?

A. $16.95.

Q. When were you to pay it back?

A. We never had any set time.

Q. Did you give him your note for it?

A. Yes.

Q. Who went on the note?

A. No one.

115 Q. Have you any property?

A. No.

Q. You say you were not to be reporter in order to pay Joe Staples back this money; that there was no set time to pay it back?

A. Yes, sir; I do; there was no set time.

Q. You say you saw George Beamer at one; how far were you from that distillery?

A. I do. I was between fifty and one hundred yards away, I reckon.

Q. Were you in the brush then?

A. I went down below the distillery and set down in the bushes and watched a while.

Q. Did he see you there?

A. If he saw me, I don't know it.

Q. You were trying to hide from him, were you not?

A. Yes.

Q. What time of day was that?

A. Between sundown and dark.

Q. What did he do?

A. He came out and got a turn of wood.

Q. Is that the only time you saw him?

A. No.

Q. Did you see him more than once?

A. I saw him twice.

Q. What was he doing the second time?

A. One time—don't remember whether it was the first or the second time—he came out and went up to where there was some wood and got some wood.

Q. Then he got some wood on both occasions?

A. I think he got two pieces.

116 Q. Didn't you swear once before that he came out into the yard and was knocking on a barrel?

A. It seems to me that he came out and was knocking on a barrel; he carried one into the house.

Q. The last time you testified didn't you say you never saw him knocking on a barrel.

A. I don't say positive that I didn't see him.

Q. In the cross-examination were you not examined as to barrels or whether he was knocking on a barrel. Haven't you sworn be

fore in this case that the time you saw Beamer there he came out into the yard and was knocking on a barrel, and then didn't you positively deny it the next time?

A. No; I didn't positively deny it.

Q. Do you positively deny it now?

A. No; I think he came outdoors, I don't remember, I didn't pay much attention to him. I was looking to see who I could see.

Q. Were you looking to see who it was?

A. I knew who it was as quick as I saw him.

Q. Didn't you see anybody else there but him?

A. No.

Q. And you can not tell now exactly what he was doing, can you?

A. He came out and got some wood; I will not be sure whether he was knocking on a barrel or not. He came to the door a time or two and stood in the door.

Q. You were at the trial of W. E. Rakes, when they tried him for stilling, weren't you?

A. I was.

117 Q. Did you testify?

A. No, sir.

Q. You did not tell them on that occasion that you had seen him at this distillery?

A. No.

Q. Did you swear out the warrant for W. E. Rakes?

A. No.

Q. Did you authorize anybody to swear it out?

A. No; I didn't tell anybody to swear it out. Mr. Thomas and Mr. McAdams got my statement.

Q. How much of the time did you stay at your Aunt Jane's?

A. Pretty much all the time, when I was not in the West.

Q. What did you do at Aunt Jane's?

A. Nothing to amount to anything.

Q. How long had you been back from the West?

A. When I reported Rakes?

Q. Yes.

A. I could not tell you.

Q. What did you do when you were in the West?

A. Sometimes I dug coal, sometimes laid track, sometimes driving.

Q. How long were you out there?

A. I don't think I stayed but two and a half or three months that trip.

Q. What time in the fall did you come back before you reported Rakes?

A. It was not in the fall, I think.

Q. Well, in the winter?

A. It was in the spring.

118 Q. Did you report Rakes in the spring?

A. No.

Q. When was it?

A. Just a little before Xmas.
Q. Does spring come in the winter?
A. No.
Q. What did you do from the time you came back from the West, in the spring, up to the time you reported Rakes?
A. I don't remember.
Q. Did you do anything at all?
A. Yes.
Q. Where? Who did you work for and how much did you get?
A. I could not tell you exactly; I worked with old man Aleck Rakes.
Q. How many days?
A. I don't remember, about a week, maybe more, maybe not so much.
Q. How much did you get from Aleck Rakes?
A. Don't remember.
Q. Who else did you work for?
A. Not anyone as I remember of.
Q. Then you can not tell of but one week's work you did from the spring of 1906 to the spring of 1907, March, can you, and during these two times between those two dates you got $20.00 for reporting?
A. I don't think I got any in March.
Q. When did you get it?
A. Don't remember.
Q. $20.00 is all you got?
A. For reporting, it was.
119 Q. I want to know if you got money from any other source than reporting?
A. Nothing but what I brought from the West.
Q. How much did you bring from the West?
A. $30.00 or $35.00, maybe $40.00.
Q. You said you stayed over at Aunt Jane's but did not do anything. How much land does she own?
A. I think there is about thirty acres of it.
Q. Where were you on Sat., the 24th of March, and what did you do that day?
A. Saturday before the 24th?
Q. What did you do on the third Sat. in March?
A. I don't remember.
Q. What did you do on the fourth Saturday in March?
A. On the fourth Sat., I don't remember whether it was the fourth Saturday or not, on Saturday before the shooting, I left on Friday night, I think.
Q. Left where?
A. Martha Thomas.'
Q. You left there on Friday night?
A. I think I did.
Q. What time did you leave there Friday night?
A. Don't remember.

Q. Where did you go from there?
A. I could not tell exactly where I did go, several places.
Q. Tell me one place.
A. I went into the Foley neighborhood.
Q. To whose house did you go?
A. I don't believe I went to anybody's house that night.
120 Q. What did you do that night?
A. I was trying to find somebody's distillery.
Q. What time did you come back there again?
A. I think I passed by there about eight or maybe nine o'clock.
Q. What time, morning or evening?
A. I think it was in the morning.
Q. What day was that?
A. Saturday, I think.
Q. Where did you go that day?
A. I went over to old man Aleck Rakes'; I saw Sam there on the farm and stayed with him that night. I didn't go to Aleck Rakes' house; to Sam Hall's.
Q. He is a witness here, isn't he?
A. Yes.
Q. He is a first cousin of yours?
A. I don't think he is a first cousin.
Q. Isn't your father Jane Hall's brother?
A. They are brothers and sisters.
Q. Who is Sam Hall's father?
A. They claim that he belongs to Iz Rakes.
Q. He is Sam Rakes, then?
A. He don't go by that name.
Q. Where did you and Sam sleep that night, Saturday night?
A. We never slept anywhere at all.
Q. Where did you go?
A. I was loafing about.
Q. Where did you loaf?
A. In back of Sam Rakes' and down in there on Popular Camp road, below Will Rakes', then down White Oak Creek.
121 Q. What time did you get back next morning?
A. Don't remember, don't remember whether we got in before daylight or not.
Q. Where did you eat breakfast?
A. I think I eat breakfast with Sam at his house.
Q. Was Sam living by himself?
A. He was living with Aunt Liz.
Q. How far was that from Alex Rakes'?
A. Between ¼ or ½ mile.
Q. When did you go back to your Aunt Jane's?
A. Very soon after I had breakfast.
Q. Sunday morning?
A. Yes.
Q. And you think you got back to Sam's some time about day?

A. I don't remember what time it was.
Q. How long did you stay up at your Aunt Jane's?
A. I don't remember.
Q. Did you go to Charity?
A. No.
Q. Did you go the public road?
A. Don't think I did.
Q. Whose house did you go by; did you go by Robert Lee's?
A. Don't think I did.
Q. Whose house did you go by?
A. Nobody's that I remember of.
Q. You went through Bob. Lee's land, didn't you?
A. No.
Q. Did you go through Charles Nowlin's land?
122 A. Yes, and through Henry Hall's land.
Q. What time was it when you got to your Aunt Jane's?
A. I don't remember now.
Q. Did you carry a still worm with you?
A. No.
Q. Who carried that one up there to your Aunt Jane's—what was there, if you didn't carry it?
A. I don't remember who carried it there.
Q. You saw it there, didn't you?
A. Yes.
Q. How long had it been there?
A. I don't know. It might have been there for a year.
Q. You saw it there and didn't ask who carried it there. Didn't you carry it there yourself?
A. No; I did not.
Q. Don't you know who did?
A. It seems like Uncle Bill carried it there.
Q. Didn't your Aunt Jane carry it there?
A. I don't know which of them carried it there.
Q. How long did you stay there that Sunday?
A. Don't remember.
Q. What time did you leave there?
A. Somewhere about 12 o'clock.
Q. And went to your Aunt Martha Thomas'?
A. Yes.
Q. What time did you get there?
A. Don't remember.
Q. Were you not at your Aunt Jane's that night, that Sunday night?
A. The night that the shooting was done?
123 Q. Yes.
A. No.
Q. Did you have a gun there that night?
A. It seems to me there was one there that belonged to me, but it was not in shooting condition.

Q. How long did you stay at your Aunt Martha Thomas'?
A. I stayed there a day or two after the shooting was done.
Q. How far is that from Charity?
A. About eight miles.
Q. What did you do down there?
A. I worked in the mountain.
Q. What sort of work?
A. Getting out cross-tie logs for Aunt Martha Thomas.
Q. That was the first work you had done in some time, was it not, Peter?
A. I don't know. It was the first I had done for a month or two, I reckon.
Q. Which way did you go to Martha Thomas' after leaving Jane Hall's that Sunday?
A. I went down and across the river at what they call the mouth of Lackey Branch.
Q. How did you cross the river?
A. Don't remember whether I waded or not.
Q. You didn't have any oats there with which to make a fire after wading across?
A. No.
Q. Who did you see on the way?
A. Can not remember whether I saw anybody or not.
Q. What time was it when you got to your Aunt Martha's?
A. It was getting along in the evening.
124 Q. Were you ever on Will Rakes' land in your life?
A. I don't know where his land runs. I have been where they said was his land.
Q. You know where he lives, don't you?
A. I know pretty close to it.
Q. If you were on his land, when was it?
A. Last winter and spring.
Q. In the day or in the night?
A. In the night.
Q. Hunting for stills, were you not?
A. I was.
Q. Did you find any?
A. No.

Redirect examination by Mr. MOORE:

Q. Mr. Hall, you were asked several times if you were not mad with Wm. E. Rakes because he swore out a warrant against you, charging you with stealing a pocketbook. Did you steal his pocketbook?
A. I found his pocketbook, and he claimed there was $8.00 in it, but he swore there was between $9.00 and $10.00 in it. When I found it there was not anything in it. When he came to see me about it I gave it to him.
Q. When you found the pocketbook, what did you do with it?

A. First, I carried it down to Nowlin's mill. Bill Brammer and the miller and my first cousin was there. I asked them if they
125 had lost anything. They said no. I asked them if it was theirs. They said no. I went from the mill to Uncle Joe's with my cousin. I showed it to them and asked them if they lost it. I think then it was a day or two afterwards; don't remember how many days, that Will Rakes came to me and asked me about it; said he heard that I found it. I told him I found it and showed it to him. He said that was the one when I showed it to him, and said there was some money in it. I said there was not. They tried me on the warrant he swore out and acquitted me.

Q. Where did you find it?

A. Between Aunt Ann Hall's and Nowlin's mill, ¼ mile from the mill.

Q. You were asked whether you told anyone about this reporting except the revenue officers. Please state whether or not you had any conversation with Charles P. Nowlin about reporting Will Rakes after he was reported.

A. Yes.

Q. How long was that after he was reported?

A. It was not but a short while, about a week I think, but I won't be sure.

Q. About a week after he was reported then, Mr. Nowlin had a talk with you about his having been reported?

A. Yes.

Q. Where was the conversation had with you?

A. Between Aunt Ann Hall's and Charity.

Q. Was that before this shooting?

A. Yes; it seems like it was a couple of months before.

Q. What relation is he to Wm. E. Rakes?

126 A. They are brothers-in-law.

Q. What did you say you were doing on Wm. E. Rakes' land a short time before your aunt was shot?

A. I was hunting for his distillery. I had an idea he was running one.

Q. The night before your aunt was shot, what were you and Sam doing down on Poplar in that country.

A. Looking for a distillery.

Q. So you stayed at your aunt's on the day she was killed, until 12 o'clock, and she was shot that night?

A. Yes. I got there along in the morning and stayed until about 12 o'clock.

Q. You had been out the night before looking for stills?

A. Yes.

Q. And the next night your aunt was shot?

A. Yes.

Q. How many different pieces of land were you on and who were the owners?

A. I was on Sam Rakes', Mollie Rakes', and I was on land said to belong to Wm. Rakes and someone else down on White Oak.

Q. What kind of a night was that?

A. It was a little sorter dark in the fore part of the night but the moon got up after night.

Q. What kind of a night was it the night your aunt was killed?

A. I think the moon rose between 9 and 12 o'clock but it was dark in the fore part of the night.

Q. Do you remember seeing anyone at your aunt's the day before she was killed at night?

127 A. Henry Roberson was there.

Q. Where did Henry Roberson live at that time?

A. He stayed with his brother Geo. Roberson at Charity.

Q. Who else stayed at Geo. Roberson's part of the time?

A. Grover Beamer.

Q. What time was Henry Roberson over there at your aunt's that day?

A. About 12 o'clock Saturday, I think, was when he saw me there.

Q. It was Saturday then, and not Sunday, that Henry Roberson saw you there, or was it on Sunday?

A. I think it was on Saturday. I won't be sure, but it was one or the other of those days.

Q. You were asked about that trial before the U. S. commissioner of Wm. F. Rakes. Did you testify on that occasion?

A. No.

Q. Who were some of the people present at that trial except you?

A. There was A. H. Staples, T. M. Staples, J. W. Staples, Tyler Rakes, C. P. Nowlin, Henderson Thomas, and I think Robt. Lee was there and Doosy Robertson and Alex Rakes. I think that was the crowd.

Q. So C. P. Nowlin was there at that trial?

A. Yes.

Q. Was that trial held since or before the murder?

A. It was after the murder I think.

Q. Was there any attorney there representing the Government—was Mr. Hoge there or was I there?

A. No.

Q. So there was no Government counsel there that day?

128 A. No, sir; nobody but Mr. Thompson, the commissioner.

Q. And you did not testify?

A. No.

Q. And the case was dismissed?

A. Yes.

Q. Did you know the reason why you did not testify?

A. Only what they told me.

Q. What who told you?

A. The Staples's.

Q. What did they tell you?

Counsel for defendant objects and the objection is sustained.

Recross-examination by Judge HAIRSTON:

Q. Didn't you deny to Charles Nowlin in that conversation that you were a reporter?

A. Why, certainly I denied it to him.

Redirect examination by Mr. MOORE:

Q. What was that conversation between you and Mr. Nowlin?

A. I met him one day a short bit after Wm. Rakes' distillery was cut up, and it came up some way; he asked me what did I report it for. I said I did not report it. He said I did. I said I did not and that anybody told a lie that said I did. He said I had to quit reporting or get out of that neighborhood; that I should not stay there and have people's distilleries destroyed. I told him that I did not have to quit; that I never had commenced.

129 Q. So he accused you of reporting.

A. Yes.

Q. He insisted that you had done it?

A. Yes.

Q. He said you had to quit or get out?

A. Yes.

Q. Why did you deny having reported the distillery?

A. I knew if they got it out on me exactly, that they would do something to me, for there has not been an informer in there yet that there was not something done to.

Q. What was done to the other informers?

Objection by counsel for defendant.

Objection sustained.

Q. So then you were doing a little lieing there to save your scalp, is that the idea?

A. Yes.

Q. With reference to the time Wm. E. Rakes' distillery was cut up, when were you put in jail; I mean before or after.

A. It was after I reported it.

130 ALEXANDER RAKES, by Mr. MOORE:

Q. Mr. Alexander Rakes is your name?

A. Yes.

Q. Where do you live?

A. In Patrick County.

Q. How far from Charity?

A. About two and a half miles.

Q. How far from Charity does C. P. Nowlin live?

A. I think about 1½ miles.

Q. There is a church there at Charity, isn't there?

A. Yes.

Q. Do you know W. E. Rakes?

A. Yes, I know Wm. E. Rakes.

Q. Is he related to you?

A. Yes.

Q. Distant, is it not?

A. I am his uncle.

Q. What do you know about his running a distillery last fall or winter at the place where the officers cut up the still. Tell all you know about it, the still that the officers cut up about the middle of December.

A. Some time about the first of the winter Will let me know when he was going to make a doubling. I went to get me some whiskey. I got me a jug of whiskey. He was doubling when I got there. I got my jug of whiskey and left there. That was along in the first of the winter, some time not far from Xmas.

Q. Was that the distillery that the officers cut up?

131 A. It was the same place.

Q. I believe I called you as a witness once before in this case. Did you tell about this circumstance at the former trial?

A. No.

Q. Why didn't you?

A. You never asked me the question.

Q. Is it a fact that you don't want to tell anything except what you are compelled to tell?

Counsel for defendant objects and the objection is overruled.

Q. State whether that is a fact. Do you only want to tell what you are compelled to tell?

A. It is not my mind to tell only what I was bound to tell.

Q. Would you be afraid to tell it?

A. I would not be afraid to tell if they would not swear any lies against me. I didn't have anything to do with it.

Q. Have you been threatened by anyone interested in this prosecution since you came here?

A. No; not particularly.

Q. How about Bill Turner, the father of Charlie Turner?

A. He met me on the street and took me——

Counsel for defendant objects.

Objection overruled and the point saved.

Q. So he met you on the street—what did he say to you?

A. He said I had better be careful; that if one side didn't get me the other would.

132 Q. What relation is he to Charles Turner?

A. He is Charlie Turner's father.

Q. You do tell the jury, though, that you did not tell that before because you were not asked? Did you see him there at any other time?

A. Way after that, in the spring, I did. Not at that time I never. In the spring, before it was cut up, I saw him there.

Q. What was he doing there then in the spring before it was cut up?

A. He was sitting there in the door with a negro.

Q. Was the distillery running?

A. Yes; I think it was.

Q. Tell the jury whether that is at the same place or not.

A. Yes; it is the same place.

Q. How long before it was cut up was it that Bill Rakes told you to come over and get a jug of liquor?

A. Long about Xmas, I think.

Q. How long before it was cut up?

A. I can not tell you exactly.

Q. What was he doing when you got there?

A. He was d'ubling the first time; he didn't have his run off, and I had to wait a while to get my liquor.

Q. How much did you get?

A. A gallon, I think.

Q. What did you pay for it?

A. $1.00.

Q. From whom did you get it?

A. From Mr. Wm. Rakes.

Q. Did you see anyone else there getting liquor at any trip you made?

133 A. I saw Monroe Smith and Charlie Turner there the same time I went.

Q. Do you know where Charlie Turner is?

A. No, sir; I don't. I reckon he is at home.

Q. Where is Monroe Smith?

A. He is here.

Q. Tell the jury whether Monroe got any liquor?

A. I don't know whether he did or not. He was there and I left him there. When I got my dram I left there.

Q. Did you or not have any conversation with Wm. E. Rakes after you had got your dram and after the still had been cut up by the officers?

Objection on the ground that time and place should be stated.

Objection overruled and point saved.

Q. Did you or not have any conversation with Wm. E. Rakes about this distillery after you had got this liquor, and after the still was cut up, concerning the destruction of it?

A. Yes.

Q. What did he say to you in that conversation?

A. He said to me that Pete Hall had reported his still and that he had damaged him forty or fifty dollars.

Recross-examination by Judge HAIRSTON:

Q. Mr. Rakes, you are the same man that testified here a few days ago, are you not?

A. Yes; I reckon so.

134 Q. You testified before that you had been there twice, didn't you, or how many times had you been there?

A. I did not state that I had been there any time on this scrape, only just what I just said.

Q. Then you are talking about a different distillery now. You are not talking about the distillery that was destroyed by the officers.

At that time Will had nothing to do with it. It was at the same place, but not the same distillery, was it?

A. I could not say that.

Q. Didn't you state that you were there at this distillery three or four times and you never saw Wm. E. Rakes there but once, and he was sitting there in the door, and you didn't see him do anything, and that you got a drink of beer and asked the colored man who was running the still for it?

A. That was the last time. Yes; that is right.

Q. Didn't you state you never saw him but once?

A. That was the last time.

Q. Didn't you state before that you never saw him at that distillery but once and that then he was sitting in the door? Answer that question now for me. Didn't you state before that you never saw Will Rakes at that distillery but once and then he was sitting in the door?

A. I don't know how to answer that.

Q. Didn't you state that you never saw him do anything, but that the negro man, who was a stranger in that neighborhood, seemed to be controlling and running the whole thing, and you asked him for a drink of beer and he gave it to you?

135 A. The two last times I went to the distillery, that is right.

Q. When was the last two times?

A. I could not tell exactly when it was?

Q. What month?

A. Can not tell.

Q. What year?

A. Last year.

Q. What time of the year?

A. Last winter.

Q. What time last winter—January, February, or March, or what time?

A. I don't recollect.

Q. When was it you went there to get your Xmas liquor, about Xmas time?

A. Some time in the first part of the winter.

Q. In reply to Mr. Moore you stated that you went there about Xmas and got you a jug of liquor. How far from Xmas was it?

A. I can not tell you.

Q. Was that the first or the last time?

A. That was the first time.

Q. How far do you think it was from Xmas?

A. I don't recollect.

Q. When was the other two times you went there?

A. Just before it was cut up.

Q. When was that?

A. In the latter part of the winter some time?

Q. You think then you went there the first time about Xmas and the other two times was in the last part of the winter. Do you mean last winter?

136 Q. Did you mean last winter?
A. Just before it was cut up.
Q. How many times were you there before it was cut up?
A. I was at the place three times.
Q. When was the first time you went there, what month and what year?
A. I don't recollect. I was sick that winter and don't recollect just when it was.
Q. You haven't got a good memory on account of having been sick last winter?
A. No, sir; I haven't got a very good memory.
Q. When was the first time you were there and saw Wm. E. Rakes there?
A. I don't recollect.
Q. What was he doing?
A. He was dubling.
Q. How long was that before Xmas?
A. I can not recollect.
Q. How long was it before you went there next time?
A. I don't recollect how long it was.
Q. Was it a month?
A. I don't recollect how long it was.
Q. Was it two months?
A. I didn't keep any account of it.
Q. Who was there with him the first time you went there?
A. Who was with who?
Q. Who was at the still house—was that negro there?
O. A. No, sir; Monroe Smith was there and Charlie Turner.
ffice. Q. Anybody else?
Objec. A. Another man, I don't know his name, he was a Salmon's,
Objecti
Q. id y.at was Salmons doing.
A. illery ; he was sitting there.
Q. ncernin s it happen you never said anything the other day about is jug of liquor?
A. The id he say ked me no such question.
Q. Didn't me that to the jury that you never saw Wm. E. Rakes there but once and he was sitting in the door. I will ask you that question now plain and you can say yes or no.
A. I cannot say neither one, I don't recollect.
Q. Whose land was that distillery on?
A. Mine or my son's one.
Q. You had some hogs there too, didn't you?
A. I saw some of my hogs around there.
Q. Didn't you tell Mr. Moore just now that it was about Xmas time when you went there to get your jug of liquor?
A. I said it was not far from Xmas.
Q. What do you mean about not far from Xmas?
A. Along in the first of the winter. I told you I did not recollect the time.

Q. And you cannot tell how far these times were apart?
A. No, sir.
Q. And you say that W. Turner said you had better be careful about your testimony in the case, that there was some danger of laying it on you.
A. I was not afraid of it.
138 Q. Just so you would tell the truth?
A. That was all they wanted.
Q. It was on your land?
A. Mine or my son's one.
Q. You got some of the whisky?
A. Yes.
Q. How far was it from your house?
A. Not more than half a mile.
Q. A little closer to your house than anybody else's, was it not?
A. Yes.
Q. How long do you think it had been there?
A. I can't tell you.
Q. How long do you know it had been there?
A. I don't know.
Q. How long did you know it had been there before you went there to get a jug of liquor?
A. I don't remember.
Q. That was the only conversation you ever had with Will Rakes in connection with this distillery at all?
A. I don't recollect.
Q. You testified against Will Rakes before the commissioner who tried him for making this liquor, didn't you?
A. Yes.
Q. Did you tell him anything then about your getting any wl from him? r wh
A. I don't think I did.
Q. Don't you know you didn't?
A. I don't think I did. liquor,
Q. Did you tell him anything about this man tellin Hall had damaged him forty or fifty dollars?
A. No. ou
139 Q. And you didn't tell anything here the other day about getting whisky from him?
A. No, I don't think I did.
Q. How long had it been before you got that jug of liquor since you had seen Will Rakes?
A. I don't know.
Q. How long do you think it was, a week, ten days, a month, or how long?
A. I can not tell you anything about that.
Q. How long had it been since you were at the distillery?
A. I don't recollect.

Q. How did you know they were going to double?
A. I would not if Will hadn't told me.
Q. When did he tell you?
A. I don't recollect when he told me.
Q. When did he tell you?
A. I never set it down; don't remember when he told me.
Q. Where was he when he told you?
A. I don't recollect. At my house I expect.
Q. Then you tell the jury that you did know they were going to double—and double on your land, were they not?
A. I did not tell the jury that way.
Q. I want to know what you did tell them. You said Will Rakes told you they were going to double before. Did you say anything to him about getting off your land?
A. It was on my land or my son's one.
Q. You don't know your own land, do you?
A. I think I do.

140 Redirect examination by Mr. MOORE:

Q. You were asked about those hogs. Mr. Rakes, how many hogs were about that still?
A. I don't know.
Q. Were they all yours?
A. No; two or three were mine.
Q. Who claimed the rest of the hogs around there?
A. They were Mr. Wm. Rakes' hogs.

141 E. PARR, by Mr. MOORE:

Q. Where do you live?
A. At Stuart, Virginia.
Q. In Patrick County?
A. Yes.
Q. What official position do you hold?
A. Division deputy collector.
Q. How long have you been such?
A. Something over two years.
Q. What did you have to do with the distillery said to belong to W. E. Rakes?
A. I raided the distillery and destroyed it. I don't know but I have heard it said it was Rakes'. I don't know that it was his.
Q. Who went with you to that distillery?
A. Mr. Joe Staples, and Mr. Arch Staples.
Q. Who else?
A. A fellow named Ed. Branch, I believe that was all.
Q. Where did you go to before going to the distillery?
A. Do you mean immediately before going to it? We went close to Mr. Aleck Rakes and tied our horses and then destroyed the distillery.
Q. Did you see Pete Hall the night you destroyed the distillery?
A. No.

Q. Did you go to Peter Hall's?

A. No.

142 Q. Do you or not know that that is one of the distilleries that Peter Hall reported to Mr. Staples?

Objection by the counsel for the defendant and question not answered.

Q. Who was the informer in this case of this distillery that you destroyed that was said to belong to Wm. Rakes?

A. I can not answer you how I got in possession of it——

By Mr. MOORE:

I now show you what is known as Form 10, which has already been introduced in evidence, in which it is recited that Peter Hall was the informer on Dec. 15th–06 and sworn to before you on Dec. 27th–06. Having shown you this paper, does this enable you to state who was the informer as to the distillery you destroyed on the occasion you have mentioned.

A. It does not; I was not in possession of that information when we made the raid.

Q. That is not the point.

A. Afterwards it came into my possession. At the time we made the raid I didn't have this information.

Q. The afterwards who was the informer?

A. My understanding was that it was Peter Hall.

Q. Did you or not make a report of that destruction?

A. Yes. I could state further if necessary that I saw Hall paid for the report. I saw Hall on the way home returning from the destruction of the distillery.

Q. I now show you Form 161, dated Dec. 27–06. Please examine that Form and state whether or not you are one of the officials who made that report.

143 A. Yes. I made this report.

Q. It is correct?

A. I think so.

By Mr. MOORE:

I would like to introduce it into evidence at this point.

Report of destruction of distilling apparatus, etc., by internal-revenue officers.

(To be made in duplicate immediately after the destruction has been made; one copy to be sent to the Commissioner of Internal Revenue through the collector, and one to be filed in the office of the collector of the district in which the seizure was made.)

Attention of internal-revenue officers is called to the following provisions of law:

"In case of seizure of a still, doubler, worm, worm-tub, mash-tub, fermenting-tub, or other distilling apparatus having a less pro-

ducing capacity than one hundred and fifty gallons per day, for any offense involving forfeiture of the same, where said apparatus shall be of less than five hundred dollars value, and where it shall be impracticable to remove the same to a place of safe storage from the place where seized, the seizing officer is authorized to destroy the same only so far as to prevent the use thereof, or any part thereof, for the purpose of distilling: Provided, That such destruction shall be in the presence of at least one credible witness, and that such witness shall unite with the said officer in a duly sworn report of said seizure and destruction, to be made to the Commissioner of Internal Revenue, in which report they shall set forth the grounds of the claim of forfeiture, the reasons for such seizure and destruction, their estimate of the fair cash value of the apparatus destroyed, and also of the materials remaining after such destruction, and a statement that, from facts within their own knowledge, they have no doubt whatever that said distilling apparatus was set up for use and not registered, or had been used in the unlawful distillation of spirits, and that it was impracticable to remove the same to a place of safe storage. Within one year after such destruction the owner of the apparatus so destroyed may make application to the Secretary of the Treasury, through the Commissioner of Internal Revenue, for reimbursement of the value of the same; and unless it shall be made to appear to the satisfaction of the Secretary and the Commissioner that said apparatus has been used in the unlawful distillation of spirits, the Secretary shall make an allowance to said owner, not exceeding the value of said apparatus, less the value of said materials, as estimated
144 in said report; and if the claimant shall thereupon satisfy said Secretary and Commissioner that said unlawful use of the apparatus had been without his consent or knowledge, he shall be entitled to such compensation, but not otherwise.

"And in case of a wrongful seizure and destruction of property under the foregoing provisions, the owner thereof shall have right of action on the official bond of the officer who occasioned the destruction for all damages caused thereby."—(Extract from section 3332, Revised Statutes, as amended by section 5, act of March 1, 1879.)

Instructions.

This report must be signed by the officer who seized and destroyed the property, and by at least one credible witness, and sworn to before the collector or a deputy collector of the district in which the destruction took place, or before some other officer duly authorized to administer oaths.

If any of the blank spaces are not sufficient for a full description a paper marked "A," "B," etc., as the case may be, containing the required information, should be attached, and reference made thereto in the proper line.

The collector who sends this will not be required to make a separate report of the seizure of the property on Form 117.

STUART, VA. (6th District of Va.),
Dec. 27th, 1906.

Date of seizure and destruction: Dec. 15th.

Location of property and name and post-office address of owner or claimant: Near Charity P. O. *Sur*posed owner, Will Rakes.

Address, Charity, Va.

Name of officer destroying property or causing destruction: E. Parr, D. C.

Names and addresses of witnesses: J. W. Staples, T. M. Staples, A. H. Staples, and Ed. Branch.

Description of property destroyed: One copper still, capacity 85 gallons, 6 fermenters, 300 gallons of spent beer, cap and worm.

145 Number of gallons per day the apparatus was capable of producing: 15 gallons.

Grounds of the claim of forfeiture of the property, giving act and section violated. (State facts fully.)

It was set up for the distillation of spirits without first having given bond as required by secs. 3260 & 3281 of the Revised Statutes.

Reasons for destruction: It was impracticable to remove the same to a place of safe storage.

Estimated fair cash value of the apparatus destroyed: $50.00.

Estimated fair cash value of old copper or other materials remaining after such destruction: $5.00.

Any arrests made. Any other information: No arrest made.

We, E. Parr, D. C., J. W. Staples, T. M. Staples, and A. H. Staples, do each severally swear that the within is a true and faithful report of the seizure and destruction of a distilling apparatus, and that from facts within our knowledge we have no doubt whatever that said distilling apparatus was: (1) Set up for use and not registered; and (2)[a] had been used in the unlawful distillation of spirits; and (3) that it was impracticable to remove the same to a place of safe storage.

E. PARR, *Dep. Coll.*
A. H. STAPLES.
J. W. STAPLES.
T. M. STAPLES.

Sworn to and subscribed before me this 27th day of Dec., 1906:

E. PARR, *Dep. Coll.*

Q. I see that you valued this distillery at about $50.00; is that valuation about correct?

A. I think so; yes, sir.

Q. Where was this distillery located?

146 A. It was located somewhere about a mile north of Charity, near Mr. Aleck Rakes' house.

Q. About how far from Aleck Rakes' house?

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[a] If both clauses numbered 1 and 2 do not exist, the one not existing should of course be stricken out.

A. I would say between ¼ and ½ mile.

Q. Did you or not remember seeing any stock feeding about there when you destroyed it?

A. I remember seeing cattle there, don't remember seeing any hogs. They had the appearance of being fed around there. I don't know whether they were or not.

H. L. LAWSON, by Mr. MOORE:

Q. What official position do you hold?

A. Deputy collector.

Q. How long have you been such?

A. Nearly four years.

Q What do you know about a distillery that was said to have belonged to Grover Beamer?

A. I helped destroy this distillery about the first of last March in the vicinity of Charity, Patrick County, which the informer stated was Grover Beamer's.

Q. Where was that distillery located with reference to Charity?

A. About three-quarters of a mile from Charity store, hardly a mile, I traveled at night.

Q. Who was the informer?

A. Peter Hall.

Q. State whether or not he went with you and everything that happened that night.

A. The posse went to Peter Hall's house about one or two o'clock at night. He got up behind Mr. Staples, the deputy marshal, I think.

147 We rode within one hundred or two hundred yards of this distillery and tied our horses. He led us down to it. We got there between two and three o'clock in the morning. We destroyed that distillery, and Hall at the same time had told us of another distillery over on, I forget the name of that creek, but about two miles from there, which belonged to Landon Hall. We went from this distillery, supposed to be Grover Beamer's, to the Landon Hall distillery, and Pete Hall left us at daylight, or a little before daylight, at the Landon Hall distillery.

Q. Where did you get your breakfast that morning?

A. At Charity.

Q. Did you see any parties at Charity who were interested, or said to be interested, in this still?

A. I saw Grover Beamer at Charity at the store.

Q. I show you Form 161, dated March 7; please examine the same and state whether or not you made that report.

A. Yes, I did.

Q. Is it correct?

A. It is.

By Mr. MOORE:

I would like to introduce it.

Report of destruction of distilling apparatus, etc., by internal-revenue officers.

(To be made in duplicate immediately after the destruction has been made; one copy to be sent to the Commissioner of Internal Revenue through the collector, and one to be filed in the office of the collector of the district in which the seizure was made.)

Attention of internal-revenue officers is called to the following provisions of law:

"In case of seizure of a still, doubler, worm, worm-tub, mash-tub, fermenting-tub, or other distilling apparatus having a less producing capacity than one hundred and fifty gallons per day, for any
148 offense involving forfeiture of the same, where said apparatus shall be of less than five hundred dollars value, and where it shall be impracticable to remove the same to a place of safe storage from the place where seized, the seizing officer is authorized to destroy the same only so far as to prevent the use thereof, or any part thereof, for the purpose of distilling: Provided, That such destruction shall be in the presence of at least one credible witness, and that such witness shall unite with the said officer in a duly sworn report of said seizure and destruction, to be made to the Commissioner of Internal Revenue, in which report they shall set forth the grounds of the claim of forfeiture, the reasons for such seizure and destruction, their estimate of the fair cash value of the apparatus destroyed, and also of the materials remaining after such destruction, and a statement that, from facts within their own knowledge, they have no doubt whatever that said distilling apparatus was set up for use and not registered, or had been used in the unlawful distillation of spirits, and that it was impracticable to remove the same to a place of safe storage. Within one year after such destruction the owner of the apparatus so destroyed may make application to the Secretary of the Treasury, through the Commissioner of Internal Revenue, for reimbursement of the value of the same; and unless it shall be made to appear to the satisfaction of the Secretary and the Commissioner that said apparatus has been used in the unlawful distillation of spirits, the Secretary shall make an allowance to said owner, not exceeding the value of said apparatus, less the value of said materials, as estimated in said report; and if the claimant shall thereupon satisfy said Secretary and Commissioner that said unlawful use of the apparatus had been without his consent or knowledge, he shall be entitled to such compensation, but not otherwise.

"And in case of a wrongful seizure and destruction of property under the foregoing provisions, the owner thereof shall have right of action on the official bond of the officer who occasioned the destruction for all damages caused thereby."—(Extract from section 3332, Revised Statutes, as amended by section 5, Act of March 1, 1879.)

Instructions.

This report must be signed by the officer who seized and destroyed the property, and by at least one credible witness, and sworn to be-

fore the collector or a deputy collector of the district in which the destruction took place, or before some other officer duly authorized to administer oaths.

If any of the blank spaces are not sufficient for a full description, a paper marked "A," "B," etc., as the case may be, containing the required information, should be attached, and reference made thereto in the proper line.

The collector who sends this will not be required to make a separate report of the seizure of the property on Form 117.

149

STEWART, VA. (6th District of Va.),
March 7th, 1907.

Date of seizure and destruction: March 6th, 1907.

Location of property and name and post-office address of owner or claimant: Near Charity, Va., Grover Beamer, Charity, Va.

Name of officer destroying property or causing the destruction: Charles Gee and H. L. Lawson, D. C., and A. H. Staples, spl. employe.

Names and addresses of witnesses: J. W. Staples, T. M. Staples, Stewart, Va.; F. R. Scott, Floyd, Va.

Description of property destroyed: One 80 gal. copper still, cap and worm, 9 empty fermenters, flake stand, singlings tub, 2 barrels, 4 buckets, measuring cup and funnel.

Number of gallons per day the apparatus was capable of producing: 30 gallons.

Grounds of the claim of forfeiture of the property, giving act and section violated. (State facts fully.) In violation of secs. 3281 & 82.

Reasons for destruction: Impracticable to remove.

Estimated fair cash value of the apparatus destroyed: $100.00.

Estimated fair cash value of old copper of other materials remaining after such destruction: $12.00.

Any arrests made. Any other information: No arrest.

We, H. L. Lawson, A. H. Staples, J. W. Staples, & F. R. Scott, do each severally swear that the within is a true and faithful report of the seizure and destruction of a distilling apparatus, and that from facts within our knowledge we have no doubt whatever that said distilling apparatus was: (1) Set up for use and not regis-
150 tered; and (2)[a] had been used in the unlawful distillation of spirits; and (3) that it was impracticable to remove the same to a place of safe storage.

H. L. LAWSON, *Dep. Coll.*
A. H. STAPLES, *Spl. Emp.*
J. W. STAPLES.
F. R. SCOTT.

Sworn to and subscribed before me this 7 day of March, 1907.

CHAS. GEE, *Dept. Coll.*

[a] If both causes numbered 1 and 2 do not exist, the one not existing should be of course stricken out.

Q. Where was it you said you got with Peter Hall that night?

A. It was at the house of Jane Hall and Ann, where I was informed he lived and where we found him, about a quarter of a mile this side of Charity store.

Cross-examination by Mr. STAPLES:

Q. You wrote out this report, did you not?

A. I don't remember whether I wrote it or not. I don't think I wrote this copy.

Q. This is not an original then?

A. Yes, we are required to make that in triplicate.

Q. You don't know anything about who was the real owner of this distillery, except what was told you?

151 A. No.

Q. You don't know whether Grover Beamer owned it or not?

A. No; only what I was told.

Q. I notice here that an eighty-gallon copper still has a daily capacity of thirty gallons. Do all eighty-gallon copper stills have a capacity of thirty gallons per day?

A. That is not technically correct; it is only an estimate.

Q. I mean is the daily production fixed by the number of gallons the still will hold? Will all eighty-gallon stills have the same production?

A. Yes.

Q. I notice in one of these reports that one of them is an eighty-gallon still with a daily production of thirty gallons and the other an eighty-five-gallon still with a daily production of 15 gallons. Is not one of these reports wrong?

A. That is an estimate.

Q. But one of the reports is wrong; both of them can not be right

A. I can not tell about that.

Q. But you said the capacity of a still was fixed by its size and that all eighty-gallon stills have the same daily capacity. Now if one eighty-gallon still is put down at thirty gallons and a larger still of eighty-five gallons at fifteen gallons per day, there is something wrong.

A. If they were fixed exactly alike they would have the same capacity.

152 Q. Then there must be something wrong with one of these reports?

A. I don't know.

Q. You do say that all eighty-gallon stills have the same capacity?

A. With the same fixtures and furnace heat.

Q. Would the fixtures and furnace heat make a difference of 50%?

A. No.

Q. Well, now, are not these reports all guess work?

A. No.

Q. Is there not some guess work?

A. In my report I estimated what I thought could be made at that distillery. The other one I don't know anything about. There was no guess work in the one that we signed.

Q. But there was some guess work in one of them?

A. I don't know; I didn't make but one.

Q. Would the fixtures make a difference of 100%?

A. Hardly, I think.

Q. Then there must be some guess work in one of these reports.

Witness did not answer this question.

153 J. W. STAPLES by Mr. MOORE:

Q. Where do you live?

A. At Stuart, Patrick County.

Q. How far from the scene of the murder that is referred to in this case?

A. Eighteen or twenty miles.

Q. What official position do you hold?

A. Deputy marshal.

Q. How long have you been a deputy marshal?

A. Last April one year ago.

Q. Are you the same officer who took part in the destruction of the so-called Wm. E. Rakes' distillery and the so-called Grover Beamer distillery?

A. Yes.

Q. Who reported these distilleries to the United States authorities?

A. Peter Hall.

Q. The same Peter Hall who testified here on yesterday?

A. Yes.

Q. What do you know of the destruction of these distilleries?

A. We destroyed them.

Q. Take up the first one and describe that, the Wm. E. Rakes distillery.

A. We destroyed the Rakes' distillery on Dec. 15th–06.

Q. Of what did that distillery consist?

A. The still apparatus, tubs, etc., whatever it takes to make block-whiskey.

Q. How large a still was it?

154 A. I suppose it was somewhere from fifty to seventy-five gallon still.

Q. When did you destroy the other one?

A. I think it was the 6th day of March–07, if I am not mistaken.

Q. When was the report made of that distillery, I mean the information conveyed to the Government officials?

A. A short while before we destroyed it.

Q. Who reported that?

A. Pete Hall.

Q. Where were you when the report was made to you?

A. I think I was at the depot, on my way back from some court.

Q. Do you or not remember whether it was the Roanoke court?

A. I think it was. He met me at the depot as I was getting off the train and reported the distillery to me.

Q. What time was that court held?

A. I could not remember to save my life.

Q. It began I think the 19th day of February. When you went to cut the still, who went with you?

A. Which, Beamer's distillery?

Q. Yes.

A. Lawson and one of my brothers and I think old Capt. Gee went.

Q. Who else?

A. Pete Hall was with us.

Q. Where did you get with Pete Hall?

A. We went by his house.

155 Q. What house do you refer to as his house?

A. The house where this woman was killed.

Q. What time did he get with you that night?

A. We hardly ever left Stuart until after the phone office closed, and I suppose it was midnight when we got to his house. He stayed with us until something like day.

Q. Where did you go to from his house?

A. We first went above Charity and cut up a still supposed to be Grover Beamer's, then some two or three miles to a place that was reported to be Landon Hall's and destroyed that. There was no still at that place.

Q. I understand from your evidence, then, that you are the deputy marshal that took part in the destruction of both of these distilleries?

A. Yes.

Q. Did you carry away with you a part of any of these distilleries?

A. Yes; I kept the arm of those two distilleries.

Q. Show them to the jury, please.

A. (Witness shows the arms to the jury and continues.) The Wm. Rakes' distillery, there is a little place of solder on the arm, and it is not nearly so heavy as the other. This is supposed to be from the Wm. E. Rakes' distillery. This other is from Grover Beamer's and is a much better piece of copper. It is very easy for any man to tell the difference in copper.

(The jury examines the arms.)

Q. I don't know whether any of these gentlemen are familiar with distilleries or not. Explain to them what part of the still that is.

156 A. A still is something like a kettle. They have a cap they put on the top of it and paste it around the cap to keep the steam from losing. This comes out from the cap and the worm fits on this [indicating], and the whiskey comes out of the worm.

Q. You know the place, then, where this tragedy was committed, don't you?

A. Yes.

Q. What county is that?
A. Patrick County.

By the COURT:

Of Virginia?
A. Yes.

By Mr. MOORE:

Q. What do you know about Peter Hall having been put in jail for some offense over there in that county?

A. After we cut up the Wm. E. Rakes' distillery—could not be positive about that—he was put in jail for trespass, and I paid him out. I think that we cut up the distillery on the 15th day of December, and I think that I paid him out on the 9th of January, if I am not mistaken, and I don't think that I am.

Q. On whose complaint was he put in jail?
A. I think it was Charles Nowlin.

By Mr. STAPLES:

Don't think, Mr. Staples.

A. Well, I looked at the copy of the warrant——

By Mr. MOORE:

Q. So it was on the 9th day of January that you paid him out?

157 A. Yes.

Q. And he was put in jail after the Rakes' distillery was cut up?

A. Yes; I paid him out on the 9th day of January and the distillery was cut up on Dec. 15th.

Q. I understood you to say that you cut up the distillery of Grover Beamer on March 6th.

A. Yes.

Q. Did you or not see Grover Beamer about the time you cut up the distillery?

A. Yes; that morning he was there at the store at Charity. He didn't stay but a few minutes after we got there and went up the road towards where the distillery was. It is somewhere between a mile above the Charity store. We went back some two or three miles to Landon Hall's and cut up his and went back to the store.

Q. Whose store is that you refer to?
A. Mr. George Roberson's.

Q. Did you or not see Wm. E. Rakes about the time that this distillery was cut up?

A. Beamer's? While court was going on at Stuart, February term——

Q. Explain to the jury how that was February term in March.

A. It held over until way up in March some time. I went back from on this raid, Grover Beamer raid, and met Will Rakes coming down the court-house steps. I said something to him about we cut

another still in your neighborhood, or one of your stills, or something.

158 It seemed to make him mad, he said, Why are you all allowing Peter Hall to report his own distilleries? By God, aren't you all going to do anything with him for it? I said, if you will have a warrant issued for him and furnish me with evidence I will certainly execute the papers. He said, No; it don't seem like you all will. You all let him report his own distilleries, it seems like, God damn him, he ought to be killed.

Q. How long was that after you destroyed the Grover Beamer distillery?

A. A day or two, I don't think it was more than a day. I think it was the day after we cut the distillery.

Q. It was about the eighth of March?

A. It was the 7th of 8th, I don't remember which.

Q. I see that your name is signed to the report of the destruction of the supposed Wm. E. Rakes' distillery, that is dated Dec. 27th, in that you estimate the value of that distillery at about $50.00, the Rakes' distillery, is that a fair valuation?

A. Yes; I would consider it worth that much or more.

Q. I see that your name is also signed to a report, and both of these reports referred to are on Form 161 already shown in evidence, of the destruction of a distillery supposed to belong to Grover Beamer, in which it is valued at $100.00. Is that a fair valuation?

A. Yes; that is worth right smart more than the Rakes' distillery. I suppose that is about correct.

159 J. H. DILLON by Mr. MOORE:

Q. Where do you live?

A. In Patrick County.

Q. What official position do you hold?

A. Justice of the peace.

Q. How long have you been a justice of the peace?

A. Between seven and eight years.

Q. Do you know the defendant, Wm. E. Rakes?

A. Yes.

Q. How long have you known him?

A. I have known him several years.

Q. Did you or not, about the time of the tragedy up there in that country or a short time before, have a conversation with him relative to Peter Hall?

A. I did.

Q. When was that conversation?

A. Some where about the first of March.

Q. About how long before Miss Ann Hall was killed?

A. Well, it was in the first part of March and she was killed about the last of March.

Q. Please relate that conversation.

A. He told me that Peter Hall had been seen with a pistol hidden from common observation and that he wanted, as soon as that court

was over, that was at the February term of the Patrick County circuit court, he wanted to issue a warrant for Peter Hall for carrying a concealed pistol and wanted me to fine him $100. He said
160 he could not pay it and wanted me to send him to jail so the revenue officers could not pay him out.

Q. What else did he say about Peter Hall?

A. He told me that he had been convicted of trespass by Squire Wood and was paid out by the revenue officers.

Q. So he wanted you then to fine him so heavily that they could not pay him out?

(Question not answered.)

161 JAMES EMERSON by Mr. MOORE:

Q. Where do you live?

A. I live in the upper edge of Franklin County, on Shooting Creek.

Q. Do you know Wm. E. Rakes?

A. I think I would; I never had any personal acquaintance with him and haven't known him but a little over a year.

Q. How far does he live from where you live?

A. From where I live now, about three miles.

Q. Do you live now where you lived on the 25th of March?

A. Yes.

Q. Where were you on the 25th of March?

A. I was on Shooting Creek.

Q. I believe it is the 24th of March on a Sunday, anyhow, the Sunday Miss Ann Hall was killed. Did you see Rakes that day?

A. Yes.

Q. Tell the jury where you saw him.

A. I saw him over on Shooting Creek at a little distillery.

Q. Do you know whether Peach Rakes was interested in that distillery?

A. I think he was.

Q. So it was a little distillery then, at which you saw Rakes? How far was that from where Miss Ann was killed?

A. It was in five miles of Charity and they say she lived in the neighborhood of Charity. I don't know where she lived.

162 Q. What time in the day did you first see Wm. E. Rakes on that day?

A. Along in the morning some time, maybe about ten o'clock.

Q. Where was he when you first saw him?

A. He came to that place.

Q. Was that distillery running?

A. Yes.

Q. Was he carrying anything or not when he came?

A. He had a gun, I think, he had one there that they said was his, I am not certain whether he brought it or Booth brought it.

Q. What kind of a gun?

A. A shotgun. I never saw one like it before. They said it was a Winchester shotgun. It had a little piece under it to revolve out the shells.

Q. Who else was there at the distillery that day?

A. Peach Rakes, Will Rakes, George Booth came with Will Rakes; Little Will Rakes, George Martin, Peter Martin, and Cal Mack Alexander.

Q. Tell the jury whether or not W. E. Rakes, George Booth, Peach Rakes, and Little Will Rakes and Geo. Martin were all there at the same time?

A. I think they were, if I mistake not.

Q. Did you or not see these parties talking together, if so, tell the jury the circumstances, without my questioning you?

A. I didn't see any more than just laughing and talking until they started away. When they started away, William Rakes, Geo. Booth and Geo. Martin was at a distance and they called Peach
163 Rakes to them and they had a few words and went off together. Then Peach Rakes comes back in a short time.

Q. When did Peach Rakes leave there again?

A. He left a little before sundown.

Q. Did you or not see any more of them after sundown?

A. I did not.

Q. How close was that distillery to Peach Rakes' house?

A. It is somewhere between three hundred and four hundred yards.

Q. How many guns did you see in that party that day?

A. I am not certain how many was there; am not certain whether there was any but that one, or not.

Q. What is your best recollection?

A. It seems just like that Cal Mack Alexander had a gun, but I am not certain, and if any of the rest had a gun, I don't recollect it.

Q. Let me see if I have these names right. You say that when W. E. Rakes, Geo. Martin, and Geo. Brammer were leaving, that they called Peach Rakes to them and had a talk with him?

A. Yes.

Q. How far was that from where you were?

A. It was not very far; not much further than across this house.

Q. Did you hear what they were talking about?

A. No.

Q. How long did they talk there together?

A. Not very long.

Q. Then, if I have these names right, let me see if I have, you did not see W. E. Rakes, Geo. Martin, and Geo. Booth any more that evening, but Peach Rakes did come back that evening?

A. Yes.

164 Q. And he left again before night?

A. Yes.

Q. Then you did not see W. E. Rakes, Geo. Booth, Peach Rakes, or Geo. Martin any more after Peach Rakes left the second time?

A. No.

Cross-examination by Judge HAIRSTON:

Q. That was a blockade distillery, was it not?

A. I guess so.

Q. Do you say you think so; what did you say?
A. I said I guessed it was.
Q. You said that Peach Rakes was interested in it, didn't you?
A. Yes.
Q. Were you interested in it?

By the COURT:

You need not answer that question unless you want to.

By Judge HAIRSTON:

Q. You may decline to answer it. Was W. E. Rakes interested in it?
A. Not to my knowledge.
Q. Is it anything unusual for people to assemble at a blockade distillery and drink whiskey and get beer?
A. No.
Q. Anything uncommon in these men assembl*y*ing there that day?
165 A. No.
Q. Did you hear them make any threats against anybody at all, or were they just having a good time generally?
A. I did not.
Q. Did you hear them mention Peter Hall in any way, shape, or form?
A. No, sir; I did not.
Q. Is it anything uncommon for people in that neighborhood to carry a gun on Sunday or any other time?
A. Why, they practice it right smart.
Q. Have you named all that were there that day?
A. Did I name old man Nichols?
Q. No; you did not. Was he there?
A. Yes.
Q. Is not the coming and going such a common thing that it is very hard for you to recollect all who were there?
A. Yes; it is very common.
Q. Do you remember whether anybody came there together with Will Rakes, except Geo. Booth, or not?
A. I think not, I am certain.
Q. When they got ready to leave they had had an opportunity there for several hours to go off and talk together, had they not?
A. Well, a part of them had.
Q. Wm. Rakes had gotten there about ten o'clock in the morning, hadn't he?
A. Yes.
Q. He and Geo. Booth?
166 A. Yes.
Q. Peach Rakes was already there?
A. Yes.
Q. George Booth came at what time?
A. I don't know.

Q. But still Geo. Martin, Geo. Booth, and William and Peach Rakes had been there for some time?

A. Two or three hours.

Q. Well, they had plenty of opportunities to go off and have a talk, didn't they?

A. They had had time enough if they wanted to.

Q. And opportunites?

A. Yes.

Q. When they got ready to start home how far did they go before they called Peach Rakes?

A. Just a few steps.

Q. As far as from here to that door?

A. Perhaps a little further.

Q. They called Peach?

A. Yes.

Q. And he went to them?

A. Yes.

Q. Did they talk to him over three minutes?

A. I suppose, may be, a little longer than that.

Q. Did they talk to him longer than five minutes?

A. Not much longer.

Q. Then Peach and these three men went in the direction of Peach's house?

A. Yes.

Q. How long was Peach gone?

167 A. Not very long.

Q. About long enough for him to go down and come back; not over twenty minutes or a half an hour?

A. I don't reckon he was gone over one-half hour.

Q. It was about sundown when he came back?

A. No; the sun was not down.

Q. How far from sundown did you think it was when he came back?

A. It was not more than one-half or three-quarters high.

Q. How long did he remain there at the distillery with you?

A. Not but a few minutes.

Q. And then he went back. What direction did he go, back towards home?

A. Yes.

Q. You said you saw one they called Little Will Rakes there, didn't you?

A. Yes.

Q. What was his condition, so far as health is concerned?

A. He looked quite feeble, had his head all bound up; in fact he had been sick for a couple of weeks.

Q. Didn't he have the doctor a couple of times?

A. Yes; I went once and my brother went once for the doctor.

Q. That was the first time you saw him out of the house, wasn't it?

A. Yes.

Q. How far did he have to come up to the distillery; was it one-quarter of a mile?

168 A. I guess it was about ¼ mile.

Q. He didn't stay but a few minutes?

A. He was there when I got there and left with Peter Martin pretty soon after I got there.

Q. Do you remember what time Cal Mack Alexander left there?

A. He left there just a few minutes before I did, about the time that Peach came back.

Q. You and he left there soon after Peach came back?

A. Tolerable soon.

Q. Which way did Cal go?

A. About north from the place, opposite from Peach's.

Q. He had a gun, too, didn't he?

A. I think he did, the best I remember.

Q. In going in the direction of Peach's, when these men left there, that was in the direction of Will Rakes' home, wasn't it?

A. Yes.

Q. Do you know what time Mr. Nichols left there?

A. Yes. Him and Cal Mack Alexander left together.

Q. He and Cal Mack Alexander went off together?

A. Yes, and when I got home he was just leaving my house.

Q. Has that distillery that you all were running that Sunday ever been seized or destroyed by anybody?

A. No.

Q. Has anybody ever been arrested for it?

A. No.

Q. Did you see Grover Beamer there at that still that day?

A. No; I never saw him in my life to know him, until I saw him here.

169 Redirect examination by Mr. MOORE:

Q. You told Judge Hairston in response to his question that you were away from there that day. How long were you away?

A. I went home something before 12 o'clock; didn't leave home until after one; don't know just to the minute what time it was; it was something like 11 o'clock when I went home and when I got back it was something after one.

Q. You went to your dinner?

A. Yes.

Q. You were gone from some time about eleven or after until about one o'clock or after?

A. Yes.

Q. Who did you leave at the distillery when you went away?

A. Peach Rakes, Will Rakes, and Geo. Booth.

Q. When you got back to the distillery who did you find there?

A. I found them there and Geo. Martin, Peter Martin, and Little Will Rakes.

Q. So you left Will Rakes at the distillery—that is Will Rakes, the defendant, is it?

A. Yes.
Q. Geo. Booth, was he one of them you left there?
A. Yes.
Q. And Peach Rakes?
A. Yes.
Q. On your return the same people were there and who else?
A. George Martin, Peter Martin, and Little Will Rakes.

170 ELIZABETH & OLLIE HALL by Mr. MOORE:

Q. Ollie, ask your Aunt Elizabeth where she was the night before Miss Ann was killed?
A. At home.
Q. Ask her if that *it* the place where Sam Hall lives?
A. Yes.
Q. Ask her who came to her house that night?
A. Will Rakes, Peach Rakes, Grover Beamer, and Charlie Turner; there was five.
Q. Begin and name the*n* again.
A. Grover busted the door—the first one.
Q. Give me their names again.
A. Grover, Will, Charlie Turner, Peach Rakes, and Charlie Rakes's Will.
Q. Who is Grover; what is his last name?
A. I always called him Grover.
Q. What did they do when they came there?
A. They called for Peter.
Q. What else did they do?
A. Searched the house from bottom to top. Lit matche*d* on the door.
Q. Ask her again, Ollie, what they did when they came there that night.
A. Two of them drawed their guns right ready to fire; they was aiming to kill Peter as he came out of the house.
Q. Did you see them have the guns in their hands?
A. They had their guns right there and I would not let them come into the house and they said they was going to kill me if I didn't let them come in the house.

171 Q. What did Will Rakes say that night, this man here [indicating Will].
A. Yes; that is the one.
Q. What did he say?
A. Said they were going to kill me if I didn't let them come in the house.
Q. Where was he when he said that?
A. He was right there at the door; Will helped push the door open and I said I never done anything; there was no use to search the house.
Q. How many guns did you see?
A. Four right ready to fire when they busted the door.

Q. How many of them came in the house?
A. Didn't none come in the house but Grover.
Q. What did Grover do when he came in the house?
A. He searched the house for Peter.
Q. Where was Sam Hall when Grover came in the house?
A. In the bed.
Q. Did William Rakes have a gun?
A. Yes. His gun would shoot six times.
Q. Did he have that gun with him?
A. Yes.
Q. When did you hear that Miss Ann was killed?
A. Right soon next morning by sun up.
Q. Was that the same morning that these men were at your house?
A. It was the same night.

172 Cross-examination by Judge HAIRSTON:

Q. Ollie, can you stand behind your aunt and talk to her at all and make her understand you at all; she can not understand you except by the motion of your mouth, can she—can she hear you?
A. (Ollie.) No, sir; I don't think she can.
Q. Can she hear anybody, can she hear me talking to you now?
A. (Ollie.) I don't know whether she can or not.
Q. Why is it you have to stand in front of her and work your mouth, so that she can understand you? Get back there now where she can not see your mouth; ask her what did they say they were going to do with Peter Hall.
Ollie repeats the question standing behind Miss Elizabeth.
Witness makes no response.
Ollie, stand in front of the witness where she can see your mouth and repeat the question.
A. They never said what they were going to do with him. They said they were going to have him, that is all.
Q. Ask her if Will Rakes told her this gun would shoot six times.
A. He said up there at Aleck Rakes's that it would shoot six times.
Q. What did Will Rakes say that night?
173 A. He said he was going to find Peter; said they were going to kill her (Elizabeth) because she didn't want them to come in the house.
Q. Who said they would kill you if you didn't let them into the house?
A. Will and Peach.
Q. Were they outdoors when they said that?
A. Right at the door.
Q. Were you in the house?
A. I was standing right in the door.
Q. Did any of them make any effort to hurt you?
A. No; Peach pulled the hammer back to kill me.
Q. Did Grover see Sam?
A. Yes.

Q. Did Will Rakes have any beard on his face?
A. Yes.
Q. Like he is now?
A. Mighty nigh it.
Q. How long had it been since you saw little Will Rakes?
A. About two weeks.
Q. Where did you see him?
A. Up at Aleck Rakes's when I was washing.
Q. Did you go outdoors that night?
A. I went outdoors and stayed until they got clear out of sight.
Q. Did you go out until after they left?
A. When they started I went outdoors to see which way they went.
Q. Where did they say they were going?
A. They said they were going to kill the last one that was there if she told it.
174 Q. Were any matches struck except in the house; did they strike matches outdoors?
A. They struck them on the door.
Q. Did they strike any in the house?
A. They threw one in the house in a blaze.
Q. Did you have the lamp lighted?
A. Yes; when Grover got in the house I lit the lamp and set it on the table.
Q. How many of them hollored for Peter?
A. Will and Grover; they said they didn't intend to leave until they searched that house.
Q. Ollie, stand behind the witness and ask her this question, how old are you?
Ollie repeats the question.
Witness makes no reply.
Judge Hairston requests Ollie to repeat the question louder and yet louder.
Witness makes no reply.

Redirect examination by Mr. MOORE:

Q. What time of night was it?
A. About eight o'clock.
Q. Was the moon shining?
A. Yes; the moon was shining as bright as it could be.
Q. Which one of them struck the matches?
A. Grover struck some and Will struck some.
Q. How old are you?
A. About fifty years old.
175 Q. How far do you live from Miss Ann?
A. A mile and a half or three quarters.
Q. When these men left your house, which way were they going?
A. They went towards Jane's.
Q. How far do you live from Charity?
A. Jane's is mighty nigh ½ mile the other side of Charity church.

Q. Was the moon shining?
A. Yes, the moon was shining.

Recross-examination by Judge HAIRSTON:

Q. Ask her, Ollie, if she did not state (Mr. Hall's notes on Hearing of Motion for Bail, page thirty, on cross-examination) when she was down here last summer, when they were trying to get bail for Rakes and others, that it was about 10 o'clock at night.
A. No.
Q. Last summer didn't you swear it?
A. No.

2 Direct examination by Mr. MOORE:

Q. You say that the moon was shining when they were there?
A. Yes, the moon was shining bright when they came there.

176 SAM HALL, by Mr. MOORE:

Q. Where do you live?
A. I live on the branch below old man Rakes.
Q. With whom do you live?
A. Aunt Liz.
Q. The lady who left the stand a few minutes ago.
A. Yes.
Q. Do you remember when your Aunt Ann was killed?
A. Yes.
Q. Where were you the night she was killed?
A. I stayed there with Aunt Liz.
Q. Did anything happen there at your house that night?
A. Yes, Grover Beamer came and busted the door and searched the house for Peter Hall. He said he wanted him, he lit the lamp, and I saw him and he said if I told it he would kill me.
Q. Who told you that?
A. Grover Beamer.
Q. How many of them were in the house.
A. I didn't see anybody but Grover.
Q. Where were you when Grover was in the house?
A. I was sitting on the side of the bed.
Q. Did you see any other persons or not?
A. Yes.
Q. Where were they?
A. Out there at the door.
Q. What did you hear?
A. I heard Will Rakes's voice.

Q. What did you hear him say?
177 A. Grover asked him for some matches and he said he didn't have any; that was all I could understand.
Q. Did you go to the door?
A. No.
Q. Where was your bed with reference to the door?
A. The door opened right back towards my bed. Aunt Liz's bed was right beside the door.
Q. So when the door opened back, then you were behind the door?
A. Yes.

Q. Tell us again what Grover said when he was in the house.

A. He told me if I ever told it they would kill me—about their coming there. I didn't see none but Grover.

Q. What did he say before that while he was searching the house?

A. He said he wanted Peter Hall.

Q. How long was he in the house?

A. He was not in there very many minutes. I didn't see none but Grover.

Q. Were you frightened when they were there?

A. Grover Beamer told me if I ever told it he would kill me.

Q. What else did he say when he was leaving, or did any of them say when they were leaving?

A. I heard some of them say they would get Peter Hall at the next house.

Q. What direction were they going when they left there?

A. They went around the house and in the direction of Ann Hall's.

Q. Was that the same night your Aunt Ann was killed?

178 A. Yes; I heard the next morning that she was killed.

Q. You say you don't know what time of night it was when they were there?

A. No; it didn't seem like it was very late.

Q. Was the moon shining?

A. Yes; it was.

Q. Do you know Will Rakes, the man we are trying here?

A. Yes.

Q. How long have you known him?

A. Ever since I have been a boy.

Q. How far did you live from him?

A. Close to 2 miles.

Q. How far did Miss Ann live from where you live?

A. Two miles or more.

Q. How far do you live from Charity?

A. Two miles from Charity, and she didn't live but a little piece from there.

Q. How far do you live from Mr. C. P. Nowlin?

A. About the same distance. He didn't live far from Ann Hall's, right over to the left.

Q. So you have known William E. Rakes all your life?

A. Yes.

Q. Did you or not have any conversation with him with reference to stills being reported?

A. Yes; he told me about being a moonshiner.

Q. When was that?

A. It was last summer.

Q. Do you mean the summer before your aunt was killed?

A. Last summer it is.

179 Q. You don't mean this past summer?

A. The summer before the last.

Q. Where were you when you had that conversation with him?

A. Up above old man Aleck Rakes' barn.

Q. What was that conversation?

A. He said if a man ever reported him he would kill him, that he was a moonshiner, and if a man ever reported him he would kill him.

Q. Do you know Peach Rakes?

A. Yes.

Q. How long have you known him?

A. I have known him ever since I was a boy; he used to stay right there back of our house, on old man Dick Rakes' land.

Q. Did he ever have any talk with you about reporting?

Counsel for the defendant objects on the ground that it is a statement by Peach Rakes, not a party defendant here.

Objection sustained.

Q. You said that Grover asked for matches. Tell the jury whether he got any matches or not.

A. Yes; some of them gave him matches.

Q. What did he do with them after he got them?

A. He lit them.

Q. How did Grover get in the house that night?

A. He busted the door.

Q. Where was your Aunt Liz when that was going on?

180 A. She was there at the door.

Q. What was she doing?

A. He busted it open, she caught hold of it and tried to keep him out of the house but she could not do it.

Q. You say you were scared?

A. Yes, I was.

Cross-examination by Judge HAIRSTON:

Q. You were not a reporter, were you?

A. No; I never reported any still to the marshal.

Q. You never reported any at all?

A. No.

Q. You never took any part in the reporting and never went out looking for any at all?

A. Yes, I did; I went with Pete.

Q. How many times did you go with Peter?

A. I don't know how many times.

Q. What time did you go to bed that night?

A. I don't know what time it was.

Q. How long had it been since you had been out with Peter hunting for stills?

A. Just a day or two.

Q. How long?

A. I don't remember exactly.

Q. When was the last time you had seen Peter?

A. He left there that morning.

Q. Left where that morning?

A. Left there that Sunday morning.

181 Q. Where did Peter stay that Saturday night?
A. He stayed with me.
Q. Where did they stay?
A. I stayed at home a little while, he left there that morning.
Q. Do you remember what time you went to bed Sunday night?
A. No.
Q. What time did you usually go to bed?
A. Generally a little after dark.
Q. Was the moon shining when you went to bed?
A. I don't remember. It was shining when those people came there.
Q. You didn't get up out of bed did you?
A. Yes; I got up on the side of the bed.
Q. Did you go to the door?
A. No.
Q. Did you go to the door after they left?
A. No.
Q. How did you know the moon was shining?
A. The house was open and I could see through the house.
Q. What do you mean by the house being open?
A. There was cracks all in it, it is not a tight house.
Q. How far do you live from Aleck Rakes?
A. About one-half mile.
Q. Did you ever have anything to do with W. E. Rakes in any way—ever work for him any?
A. No, sir; I don't know as I did.
182 Q. Did you ever have much talk with him?
A. I have seen him a heap and heard him talk.
Q. There are several of the Rakes up there, isn't there?
A. Not so powerful many.
Q. How many matches were lighted inside of the house that night?
A. I don't know, I didn't count them.
Q. Who lighted the lamp?
A. Aunt Liz.
Q. Was there but one match lighted and thrown into the house before the lamp was lit?
A. I never counted.
Q. Were there three—was it five?
A. I never counted them.
Q. Were any matches lighted inside of the house before the lamp was lighted?
A. Yes; there was.
Q. You say Liz lit the lamp?
A. Yes.
Q. Didn't you say here last summer that Grover Beamer lit the lamp?
A. No; I don't think I did.
Q. I will read you the question (on page 32, evidence taken here by Mr. Frank Hall). "Q. Did you see Grover Beamer there that

night?—A. Yes, sir; he came to search the house; he lit the lamp and searched for Peter Hall." Did you make that statement?

A. I didn't say Grover Beamer lit the lamp. I said Liz lit it.

183 Q. I read you another question along the same line (page 38 near the bottom): "Did Grover Beamer then go out of the house? A. Yes, sir, after he got through hunting for Peter. Q. After he came in there and after his conversation with Rakes do you know whether he went to the door? A. He came and searched for Peter and asked where he was at. I told him he was not there. He lit the lamp. He said I better never tell, for if I did he was going to kill me."

Q. Did you make that statement? Didn't you state twice before in this court room last summer when we were making motion for bail, that Grover Beamer lit the lamp?

A. I said Liz lit the lamp.

Q. Who gave Liz the matches with which to light it?

A. She had matches on the fireboard.

Q. Did she light it before or after anybody came in the room?

A. Grover was in there when she lit it.

Q. Have you stated all that Grover Beamer said to you?

A. I think I told Mr. Moore all I know about it.

Q. Have you stated all you heard Will Rakes say?

A. I knew his voice.

Q. Have you stated all you heard him say?

A. I recognized his voice.

Q. Was that all he said?

A. I could not understand anything else he said; that is all I understood him to say.

Q. How far was your bed from the door?

A. I don't know how big the house is; it is in the far corner of the house.

Q. What was the first thing you knew whether anybody was there?

184 A. When they broke the door.

Q. When Grover shoved the door and came in?

A. Liz tried to keep him out.

Q. Was she at the door or in the bed?

A. Yes, sir; she was.

Q. Which was she, in the bed or was she holding the door?

A. When he hit the door she was in the bed.

Q. She didn't get up until after the door was opened?

A. She got up about the time the door flew open. She tried to keep them out of the house.

Q. Did anybody say anything to her while she was trying to keep them out of the house?

A. She told them not to come in.

Q. Did anybody say they were going to hurt her, or did anybody hurt her in any way, shape or form?

A. Nobody that I know of.

Q. Did Grover have a gun?

A. I didn't see none.
Q. You were on pretty good terms with Grover, haven't you been?
A. I have not got much against him.
Q. Were you not arrested for carrying concealed weapons, and didn't he testify against you?
A. Yes.
Q. You were not friendly with him, were you?
A. I didn't have any business to carry the pistol, is the way I looked at it.
Q. He did right, then, to swear out a warrant against you?
A. I had no business with it.
185 Q. You were on good terms with Will Rakes, ain't you?
A. I don't know as I have anything against him.
Q. Didn't he take some sacks away from you at the mills that were stolen?
A. No; he claimed one; it was misplaced in the corn.
Q. You were mad at Peach Rakes, were you not?
A. I didn't like his hitting me with that rock?
Q. Will's name happened to be on the sack?
A. Yes; he said it was on there.
Q. You knew it was on there, didn't you?
A. I could not tell; I can not read.
Q. You don't like any of the Rakes's, except Old Man Aleck?
A. I have nothing against them, only Peach.
Q. Will's brother whipped you for stealing a knife, didn't he?
A. No, sir; his cousin; he might have done that while I was small.
Q. You don't like Peach for hitting you with a rock?
A. No.
Q. You were running off then with a jug of liquor you had stolen, weren't you?
A. No, sir.
Q. How many times have you been whipped for stealing?
A. I don't remember as I was ever whipped but once, and that was when I was a small boy.
Q. Didn't a man by the name of Smith whip you once for stealing?
A. Not that I remember.
186 Q. Didn't Rakes whip you for stealing?
A. What Rakes?
Q. G. F. Rakes.
A. Turner Rakes did when I was small.
Q. Is it not a fact that you are not allowed to go in the store up there at all?
A. I generally go in when I want to.
Q. What time was it these men were at the house that night?
A. I don't know.
Q. Who was there that night besides you and Liz?
A. Nobody was there until those people came there.
Q. Where was Ollie?
A. She was at Joe's, so she said.

Q. You were in the same room with Liz Hall, weren't you?
A. There is not but one room to the house.
Q. And the only thing that you heard anybody say outside was that Will Rakes said he didn't have any matches; that is true, is it not?
A. I heard them say they would get Peter Hall at the next house.
Q. They said that just as they were leaving?
A. Yes.
Q. Going around the house?
A. Yes.
Q. That was not in your sight or Liz Hall's sight, either, was it?
A. I could hear them talking.
187 Q. But you could not see them, could you?
A. No.
Q. You say you are mad with Peach because he hit you with a rock?
A. I didn't like his hitting me with a rock.
Q. When did that happen?
A. I don't know when it was. It was not many days before Aunt Ann was killed.
Q. Where did that happen?
A. At George Brammer's.
Q. What were you doing there?
A. I went up there to run some bullets, and carried a jug there to get me some liquor.
Q. You carried a jug there?
A. Yes, I did.
Q. Didn't you have a conversation with Geo. Roberson a few days after this thing occurred up there at Charity? I mean the merchant.
A. I go up there to the store sometimes.
Q. Didn't you tell Geo. Roberson that nobody came to your house that night?
A. I told him there was nothing of it.
Q. You told him there was nothing of it?
A. I told him there was nothing of it.
Q. Was that statement true or false?
A. Why certainly they came there. I was afraid to tell it.
Q. Then your statement to Geo. Roberson was false?
A. Yes, I was afraid to tell it.
Q. They saw you there that night, didn't they; Grover Beamer saw you there sitting on the side of the bed?
188 A. Yes; he did.
Q. There was no harm done you at all, was there?
A. No, sir; he never hurt me that night.

Redirect examination by Mr. MOORE:

Q. So you did have a talk with Geo. Roberson a few days after these people were at your house?
A. Yes.
Q. At his store?

A. Yes.

Q. Is he the same Geo. Roberson that Grover Beamer lived with a part of the time?

A. Yes.

Q. Had Grover Beamer been arrested at the time you had this talk with him?

A. I don't remember.

Q. But you say you were afraid to tell him what you did know?

A. Yes; I was afraid.

Q. You were asked about the warrant that Grover Beamer had against you. What was that warrant for?

A. It was for carrying a pistol.

Q. Do you mean to tell the jury that you did not have a pistol, or that he ought not to swear out a warrant for you?

A. I mean that I had no business with it.

Q. Didn't you have a pistol?

A. Yes.

Q. And you mean to tell the jury that you didn't have any business with it?

189 A. Yes.

Q. I believe they asked you about Will Rakes swearing out a warrant for you about a couple of bags?

A. No, sir; he didn't swear out any warrant; I picked up a bag; I didn't know which bag I was taking; there was not but one there, and I thought it was mine.

Q. Did you have a bag yourself?

A. Yes; I carried a half bushel of meal to the mill; there was not but one bag there, and I thought it was mine.

Q. He claimed that bag?

A. Yes; he got them both. He said his name was on it.

Q. You were asked about somebody whipping you for stealing a knife. How many years ago has that been?

A. I don't know.

Q. Who was that?

A. Turner Rakes.

Q. Had you taken his knife?

A. Yes; I picked it up. I was a small boy.

Q. Did you give him the knife back?

A. Yes.

Q. Then you were asked if you were not stealing a jug of liquor when Peach Rakes hit you with a rock?

A. No; I didn't. Old man Aleck Rakes sent me up there for it.

Q. When he hit you with the rock, what did he hit you for?

A. He said that if I didn't quit running around with Pete Hall reporting still places that he would kill me.

Q. How long was that before your aunt was killed?

A. It was right long close, Joe Hall knows the time.

(He is summoned here.)

190 Q. It was a fact, then, that a few days before your aunt was killed, you and Peter were out looking for stills places.

A. Yes.
Q. That is about the time that Peach hit you with the rock?
A. It was not far from that.
Q. Where was Peach when he hit you with the rock?
A. At Geo. Brammer's.
Q. Where were you?
A. I was up there, too.
Q. What were you doing when he hit you with the rock?
A. I was going home. He was standing behind the hog pen and just stepped out and hit me with the rock.
Q. Did he hurt you much with the rock?
A. Yes; he cut a big gash in my head and the blood ran all over me.
Q. Were you carrying the liquor?
A. Yes; I throwed it down and run.
Q. That was the jug of liquor for Mr. Aleck Rakes?
A. Yes.
Q. Is he the same Aleck Rakes that you refer to as having worked for some?
A. Yes; I worked for him a heap.

By Judge HAIRSTON:

I forgot to ask you a question. How was Grover Beamer dressed that night?
A. He looked like he was dressed up alright, black looking clothes and had on a cap.
Q. Did he have on his Sunday clothes?
A. They looked like Sunday clothes to me.

191 By Mr. MOORE:

Q. You say that you were afraid to tell Geo. Roberson?
A. Yes, sir; I was.
Q. Tell the jury how afraid you have been, up there in that country; what you have had to do to protect yourself.
A. I have not stayed at home a night since I was at Lynchburg. I have been going around and laying out some nights.
Q. You mean you were afraid to stay at home?
A. Yes.
Q. Were you afraid back yonder at the time you were talking to Mr. Roberson?
A. Yes, sir; I was.
Q. There was just one room in the house where you and Aunt Liz were staying?
A. Yes; there was no upstairs there.

By Judge HAIRSTON:

Q. Where did you stay the month of April?
A. I don't remember.
Q. Did you stay at home?
A. No, sir; I have not stayed at home any night; not since I came here to Lynchburg.
Q. That was before you came here; where did you stay?

A. I stayed first one place and then another.
Q. Did you stay at home?
A. No, sir; I didn't stay home much.

193 By Mr. MOORE:

Q. Why didn't you stay at home?
A. I was afraid to stay at home.
Q. What were you afraid of?
A. I was afraid of Grover; they didn't catch him for a long time. They arrested Will and put him under a bond, and I was afraid.

By Judge HAIRSTON:

You operated a still under that house there, didn't you?

By the COURT:

You need not answer that unless you want to.

By Mr. MOORE:

Q. You were asked some questions a while ago about what you said on former trials as to who lighted the lamp.
A. Liz lit the lamp.
Q. Is that your best recollection now that your Aunt Liz lighted the lamp?
A. Yes.
Q. So if you stated on former trials that Grover lit the lamp, your recollection is in error now, or at that time?
Counsel for defendant objects.
Objection sustained.
Q. I will ask you if you said this on a former trial, in connection with lighting the lamp (page 38, Motion for Bail) you were asked this question: "Q. Was the door shut? A. Yes, sir; the door
194 was fastened. Q. What was the first you heard of any one coming? A. Somebody struck the door and knocked it wide open. Q. Was the moon shining? A. Yes. Q. Did you see any one? A. I did not go to the door. Aunt Liz went to the door. Q. Did you get out of bed? A. I sat up on the side of the bed. She told them there was nobody there. He said, "Let me come in," and Grover came in. Q. Grover came in, and no one else? A. Yes, sir; no one else. I heard Will Rakes's voice. Q. How far from the house? A. He appeared to be right there at the door; he told Grover he didn't have any matches. Q. Is that all that Will Rakes said? A. Yes. Q. Did Grover then go back out of the house? A. Yes; after he got through hunting for Pete. Q. After he came in there, and after his conversation with Rakes, do you know whether he went to the door? A. He came in and searched for Pete and asked where he was at. I told him he was not there; he lighted the lamp. Q. After he commenced the search, did he go out and come back or did he finish it? A. No; when he went out he went on." Now, do you remember whether you stated every word before his honor in July on the motion for bail; do you remember whether or not you stated that or not?
A. I think I stated that Liz lit the lamp.

POOR COPY

Q. But the other things that I have read, did you state that?

A. Yes.

Q. And your recollection is that you think you stated that your Aunt Liz lit the lamp?

A. Yes.

Q. In the same connection, you were asked a while ago
195 concerning your evidence at page 32. I will ask you if in connection with what you said about the lamp, you did not also say this: "Q. Was there any one at your house that night? A. No, one besides me and Aunt Liz. Q. Did any one come to your house that night? A. Grover Beamer that I know, and knew Will Rakes' voice. Q. Did you see Grover Beamer that night? A. Yes; he came and searched the house and lit the lamp and searched for Pete Hall. Q. What did he say about Peter? A. Said he wanted him. Q. What were you doing when they came? A. I was in bed. Q. Did you get out of the bed? A. I set on the side of the bed. Q. Was any one else in the house besides Grover Beamer. A. No, sir; none but Grover."

Counsel for defendant objects.

Objection overruled.

Question not answered.

196 JANE HALL, by Mr. MOORE:

Q. Where do you live?

A. In Patrick County.

Q. How close to Charity?

A. It is in hearing of Charity.

Q. Are you the sister of Miss Ann Hall who was killed last March?

A. Yes.

Q. I wish you would tell the gentlemen of the jury and his honor all that you know about what happened at your house the night that your sister was shot.

A. I went down to brother's a little while that night and came back I laid down. I reckon I dropped off to sleep. We had a dog there that was tolerably fierce; he flew out and barked and next thing I heard a report of a gun. I got up and went to the door and saw a bunch of men. They divided and went around the house and commenced shooting in the house. I opened the door and left the door open. We started to the fire and she said "My arm is ruined. My arm is ruined." Then she fell to the floor and the next word she spoke she said, "I am done. I am done." After they quit shooting Grover Beamer busted the door open and came in the house. They first came to the door; Will and the bunch of men came to the open door. I knowed Will just as soon as he came to the door.

Q. Will who?

A. Will Rakes, that man right there [indicating the defend
197 ant], broke the door open and then he came up to the door on the southwest side. I asked him to come in and help me with my sister. He said, "Let her lie and sleep, let her lie and sleep while she can."

Q. Who did you ask that?
A. Will Rakes.
Q. The prisoner?
A. Yes; Grover Beamer came in the house and tore up my things. He asked me where was Peter Hall. I said "Peter Hall don't stay here." Said he, "the man I am going to have before I leave here." The next reply he said, "I have seen a heap of people in this fix."
Q. Who was he talking about?
A. He didn't say.
Q. Who were you talking about?
A. It was Ann.
Q. Your sister Ann?
A. Yes.
Q. So you were talking about your sister Ann when Grover said he had seen a heap of people in that fix. Where was she then?
A. Lying on the floor.
Q. What was her condition?
A. She had done been shot.
Q. Did Wm. Rakes make his statement to you about that time or not, when you asked him to help you; was his statement made about that time?
A. Yes.
Q. When you spoke to him what did you call him?
A. I called him Will Rakes.
198 Q. Where was he when you spoke to him?
A. Standing at the door.
Q. Which door was he standing at when you spoke to him?
A. He was standing at the southwest door.
Q. Where was Grover Beamer when you spoke to Will Rakes?
A. He was in the house.
Q. What was he doing?
A. Lighting matches and hunting for Peter Hall and tearing up things. He turned over the molasses and threw my table out doors.
Q. How many shots struck your sister, do you know?
A. I don't know.
Q. Did any strike you?
A. Yes; one struck me right in my left arm.
Q. Do you know where your sister was at the time the shots struck her first.
A. I don't exactly remember; as we turned from going toward the fire, she fell about one-half way between the door and the fireplace.
Q. When you asked Will Rakes to help you, what were you trying to do?
A. I was trying to get out. I said, "Ann 'les get up and get out; they will burn you up here in the house, 'les get out."
Q. How long did these men stay at your house that night, have you any idea?
A. I have no idea, for I didn't look at the timepiece; I looked when they left and it was between 1 and 2 o'clock.

POOR COPY

199 Q. What kind of a night?

A. A light moonshiny night.

Q. How many men did you see?

A. I saw five, and how many more outside I don't know. I started out to see who the others was, and they said they would shoot me if I came out there.

Q. Grover was in the house and Will Rakes had come to the door?

A. Yes.

Q. How many guns did you see?

A. I saw three guns.

Q. Miss Jane, I show you here a door, said to be a door from your house. Please state to the jury whether it is or not.

A. Yes; that is the door.

Q. Which door was it that Grover Beamer came in?

A. This door.

Q. Which door was it that you went to and left open?

A. The northeast door.

Q. It was the other door, then?

A. Yes.

Q. How did Grover get in through this door?

A. He busted it open; he busted a piece off right there [indicating].

Q. Tell the jury whether those shots were fired through this door that night.

A. Yes; they were.

Q. Was your sister shot before Grover came in the house?

A. Yes.

Q. Do you know where the shot came from that reached her?

200 A. No.

Q. Were any shots fired into the house except those shot through the door?

A. There was some fired through the window.

Q. Do you know how many were fired through the window?

A. No.

Q. What effect did they have on the window?

A. It busted the sash all to pieces, busted the window out.

Q. Do you remember whether the shots were fired through the door or through the window first? Can you remember that?

A. No, sir; I can not.

Q. So you don't know where the shots came from that struck your sister?

A. No.

Q. You may be asked some questions, Miss Jane, about some marks on this door, on one side or the other I don't know which, about what appears to be some bullet holes that were made there in it some time. Do you know whether they were made before these shots that night? It seems to be two holes here [indicating]. Were they made before that night?

A. Yes.

Q. Do you know, of your own personal knowledge, how those holes were made and who made them?

A. No, I don't.

Q. Was this piece on the door at the time it was broken open—this heavy piece?

201 A. No; it was not.

Q. So the fastening was here [indicating]?

A. Yes, sir; that fastened it right there.

Q. What did I understand you to say about when Grover came into the house, before the shooting or after the shooting?

A. After the shooting. The shooting was done before Grover came in there. After he came in there none was done.

Q. So the holes had been made in the door before he broke it open?

A. Yes.

Q. When he came in, then, your sister was on the floor. Now, in what part of the house was she lying when he came in and in what part of the room?

A. Between the door and the fire place.

Q. Did you move her any, or not?

A. Yes; I tried to get her up and get her out of the door. She said, "I can not." I finally slipped her to the door and got her feet out of the door. I turned around and lit the lamp.

Q. Where were the men then when you were trying to get her out of the door?

A. They had left. I wanted to get some bed clothes so I could go after somebody.

Q. When they left in what direction did they go?

A. Towards Charles Nowlin's.

Q. Do you know where Joe Hall lives.

A. Yes.

Q. Was that going also in the direction of Joe Hall's.

A. Yes.

Q. After your sister was shot you tried to get her to the door?

202 A. Yes.

Q. How long did your sister live after she was shot?

A. Not over ten or fifteen minutes.

Q. What did you do after you tried to get her out of the door?

A. I lit the lamp, and by that time she had dropped her head over on her lap. I laid her down on some pillows. I went to Bob Lee's. He said he would not go without I went to Gillie Thomas's. I went, too, after him. Never put on any shoes nor nothing; it was the 4th Sunday night in March.

Q. When you got back what was the condition of your sister?

A. She was dead.

Q. Who came back with you?

A. Robert E. Lee and Gillie Thomas.

Q. Was she in the same position in which you left her.

A. Yes.

Q. You spoke about the dog flying out and the report of a gun. Tell the jury whether or not that dog was shot.

A. Yes; he was shot; he died on Monday evening.

POOR COPY

Q. Did you find anything in the yard next morning that indicated that shooting had been done?

A. Yes.

Q. What?

A. There was eight shots fired into the house, and one that was not fired.

203 Q. So you found eight empty shells in the yard and one that had not been fired.

A. Yes.

Q. This was in Patrick County, Va., was it?

A. Yes.

Q. What time was it.

A. On the fourth Sunday night of March.

Q. What kind of a night was it?

A. A light, moonshiny night.

Q. Who was at that house besides you?

A. Nobody but me and Ann.

Q. When had Peter Hall been there?

A. He was there that day a little before 12 o'clock and then he left.

Q. Where did he live, part of the time at least, while he was in that neighborhood?

A. He stayed there some, and stayed at his Uncle Joe's some, knocking around.

Q. So when he was in that neighborhood he stayed with you some and at his Uncle Joe's some?

A. Yes.

Q. When this dog was shot you went to the door, you say, and opened the door and left it open?

A. Yes.

Q. Where did these men place themselves after you went to the door?

A. They came on up to the door and then divided and went around the house.

Q. What do you mean by dividing and going around the house?

204 A. They went around the house and shot in on the other side, the southwest side.

Q. When was it that Will Rakes came to the door and you had this talk with him?

A. It was after the shooting. When he came to the northeast door I never spoke to him, I knew him the minute he came to the door.

Q. When was it you spoke to him and asked him to help you?

A. After Grover broke the southwest door open.

Q. So none of those men there that night offered to help you with your sister?

A. No, sir; not one of them.

Q. And you left your sister, when you started to Mr. Lee's, near one of those doors?

A. I left her with her feet on the steps and her lying on the door.

Q. Were you frightened much?

A. I was frightened some.
Q. How many men did you say were in the party?
A. I saw five, and I don't know how many more was outside.
Q. How many guns did you see?
A. I saw three guns.
Q. Do you know which of the men had the guns?
A. No.
Q. Did Grover Beamer have a gun at the time he was in the house?
A. No.
205 Q. So you saw three guns out doors and you don't know which of the men had the guns?
A. No.
Q. You saw five men and how many more you don't know?
A. Yes.
Q. What time of night did this happen?
A. Between one and two o'clock.

Cross-examination by Judge HAIRSTON:

Q. Where did you stay that Sunday?
A. I stayed at home all day until in the evening, the sun was about ½ hour high, maybe a little higher, didn't look at the time piece.
Q. How far does your brother Joe live from you?
A. About two miles.
Q. How long did you stay at his house?
A. I didn't look at the time piece, it was five minutes past nine o'clock when I left there.
Q. Was it dark when you left?
A. Of course, it was nine o'clock in the night.
Q. Was the moon shining?
A. Yes.
Q. Are you sure the moon was shining?
A. Yes.
Q. Who came with you back from your brother Joe's?
A. Nobody at all.
Q. Which way did you come, by the road?
A. Yes; I came by the road.
206 Q. The road by Nowlin's mill?
A. Yes.
Q. By Charles Nowlin's?
A. Yes; by the road, but I didn't come by his house.
Q. How far is his house from the road? Isn't but a little piece from the road?
A. I didn't have any business down there and I didn't go there.
Q. What did you say you had been to your brother Joe's for?
A. I went there to see him about some oats.
Q. Didn't you bring anything back with you?
A. No.
Q. You didn't bring a still worm back with you that night, did you?
A. No, sir.

POOR COPY

Q. What was that still worm doing in your yard next morning.
A. It was one that was up stairs there.
Q. Whose was it?
A. I don't know.
Q. You don't know whose it was?
A. No.
Q. Who brought it there?
A. I never asked any questions.
Q. And you tell the jury that there was a still worm there at your house, and you knew it was there and never asked any questions, and didn't know who brought it there?
A. No; I never asked any questions.
Q. Hadn't you been off that night in the whiskey business, you and your brother Joe?
207 A. No.
Q. You had not?
A. No.
Q. Hadn't you been off down there to make you a little run that Sunday evening?
A. No; I never left home until between one-half hour and one hour by sun.
Q. Well, you generally make it by night, don't you?
A. I don't know anything about making it at night myself.
Q. You have made it in the night, havn't you?
A. I don't remember if I have.
Q. You have made it in the day, haven't you?
A. Of course, I made a little in the day. I have not made any since I served my time out in jail, and never intend to any more.
Q. You have been twice convicted as a distiller, haven't you?
A. No.
Q. You have not?
A. No.
Q. How many times?
A. I have not but once and that was right here.
Q. When you got home that night did you go to bed right straight?
A. I set there a few minutes, but a few though.
Q. And went to bed?
A. Yes; I went to bed.
Q. The first thing you heard that night after you waked up was the dog barking?
208 A. The dog waked me up.
Q. When the dog waked you up did you get up right straight, or did you wait until you heard the gun fired?
A. I never got up until I heard the report of a gun.
Q. And you got up and went to the northeast door?
A. Yes; I went to the northeast door.
Q. You went there and opened the door wide?
A. Not exactly wide.
Q. Did you open it as far as you could?
A. No; it could have been opened further.

Q. How far did you open it?
A. Just about square ways with the floor.
Q. Who went to the door when you went there to open it—you and your sister?
A. Yes.
Q. Both stood in the door?
A. No; when we saw the men we turned from the door a little.
Q. How far were these men from the door?
A. Just above, in the yard.
Q. How far did they come to this door?
A. They come up to the door. Will Rakes was the first one I saw, but then they divided and went around the house.
Q. They came to the door?
A. Yes.
Q. Stand there any time?
A. No.
Q. They stood there a minute, didn't they?
209 A. Not more than that.
Q. Did they ask you to let them come in?
A. No.
Q. You never spoke to them?
A. No.
Q. How close did Grover Beamer and Will Rakes come to that door while you were standing there in it?
A. Will came right up to the door.
Q. How far did Grover come?
A. They were all in a bunch right at the door.
Q. Say anything to you?
A. No.
Q. Were they disguised in any way, shape, or form?
A. No.
Q. How was Grover Beamer dressed that night?
A. He had on a white shirt and a cap.
Q. What sort of pants?
A. I won't be positive.
Q. Didn't you say before that you thought he had on overalls?
A. I think he did, but I won't be positive.
Q. You know he was not dressed in black, don't you?
A. Yes; I know he had on a white shirt and a cap.
Q. Was Will Rakes shaved like he is now?
A. No.
Q. He had a black beard, didn't he?
A. Of course it shined dark, but it was not exactly black.
Q. Full beard, more beard than moustache?
A. Yes.
Q. He came right up to the door?
A. Yes.
Q. He didn't say anything?
210 A. No.
Q. Did he have a gun?

POOR COPY

A. I didn't see him have any gun.

Q. Didn't you just now state that you didn't see but three guns and the men who had them you didn't recognize?

A. Of course, and I told you just now that he didn't have any gun.

Q. Did Grover Beamer have a gun?

A. If he did I didn't see it. The three that had guns I didn't know. They said they would shoot me if I came out there.

Q. The only two that you did recognize were the two that didn't have guns.

A. Yes.

Q. You say they stood there a minute or two and then divided, didn't you?

A. Not more than a minute; then they divided and went around the house, and then turned into firing into the house.

Q. One to the right and the other to the left?

A. Yes.

Q. Which way did Will Rakes go?

A. I don't remember.

Q. You said you recognized him.

A. I didn't pay attention enough to know.

Q. Which way did Grover go?

A. They were all standing there at the door. I said they were all standing there in a bunch right there together.

Q. You don't know which way Will Rakes went?

211 A. No; I know he came to the other door. Beamer busted the door open and came in.

Q. When they separated and went around to that door yonder on the southwest side, did they say anything when they left the door at all?

A. No.

Q. And you left the door and left it open, didn't you?

A. Yes.

Q. Were you very scared?

A. I was scared some.

Q. What made you leave the door open then?

A. I knew they could not do anything worse than what they had done.

Q. When they went around to the other door what did you do?

A. I went towards the fire.

Q. What did you say?

A. Nothing.

Q. What did your sister say?

A. When they shot in the house she said her arm was ruined.

Q. I mean before the shooting was done.

A. We never done nothing.

Q. You never said anything?

A. No.

Q. You never gave them any provocation for shooting in there at all, did you?

A. No.

212 Q. And there was nobody in there but you and your sister, you say?

A. No.

Q. Didn't you holler at them and drive them away from there and abuse them that night?

A. No.

Q. Didn't you throw something against the door?

A. No.

Q. Didn't you say something to make them mad.

A. No.

Q. And without any provocation, after they saw you standing in the wide open door, and without being interfered with, they went around to another door that was fastened and began to shoot in there?

A. Yes.

Q. Which did they shoot in first, the window or the door?

A. I could not tell you. I don't remember. They were shooting in both.

Q. Who shot those other holes in that door?

A. I don't remember.

Q. When were those holes shot in that door?

A. I don't remember that.

Q. How many were shot in there before that night?

A. I have never counted them.

Q. Then you tell the jury that you don't know how many holes were in the door before the night of the shooting, or who shot them or when they were shot.

213 No; for I was off and gone the bigger part of my time.

Q. You say when they left there, you told the jury that these people went towards Charles Nowlin's, did you not?

A. Yes; they did.

Q. Didn't they go towards the public road that leads to Charity?

A. They went that way, but they went towards Charles Nowlin's.

Q. Didn't they go to Joe Hall's?

A. They had to go that way.

Q. And didn't they go towards Charity?

A. Yes.

Q. Why did you single out just the one name, when there was the public road led down there?

A. Of course there was the public road led down there, but I stood there and listened what way they went before I left her.

Q. That was the main public road that went along there that led from Floyd Court House to Elamsville?

A. No——

Q. That was the road that led up to De Hart's distillery, wasn't it?

A. Yes, and to Floyd Court-House, too.

Q. Was the other door that you left open ever shut at all that night; you left it entirely open didn't you?

214 A. Well the shot may have hit it as far as I know, I don't remember.

POOR COPY

Q. You left it open, didn't you?

A. Certainly I left it open.

Q. How did you say Grover Beamer was dressed?

A. He had on a white shirt and a cap and I don't remember exactly about his pants, I could not say whether they were overalls or not.

Q. Didn't you state in your examination here before in response to the question, "What sort of pants did he have on," you answered overalls?

A. I don't remember.

Q. Didn't I ask you the question, "Are you very positive of that," and your answer was "yes; I know well enough it was Grover Beamer."

A. I know well enough it was Grover Beamer.

Q. What sort of clothes did Will Rakes have on?

A. Just common clothes.

Q. I asked you how was Grover Beamer dressed (page 23, Motion For Bail), and your answer was "White shirt with no coat on."

A. No, sir; he didn't have on any coat.

Q. And I asked you what sort of pants and you said overalls, and I asked you if you were very positive of that, and you answered "Yes, I know well enough it was Grover Beamer?"

A. I know it was Grover Beamer.

Q. You are not on very good terms with Will Rakes, are you?

215 A. If he don't bother me I don't bother him.

Q. Then you state that you were not on good terms with him, that you threatened to knock him in the head with a pound weight at the trial?

A. It was not at the trial.

Q. Where was it?

A. At George Roberson's, he disputed my word.

Q. They had you arrested up there on account of your being so rowdy, didn't they?

A. I paid it.

Q. Are you not on very bad terms with Will Rakes, didn't you state before that you didn't have any love for him?

A. Of course I have not got any love for him. If he don't meddle with me I don't meddle with him.

Q. What do they call you up there?

A. They call me "Rowdy Jane," I don't care for that.

Q. Are you on good terms with Grover Beamer?

A. If Grover don't bother me I don't bother him.

Q. Is it not a fact that you have had difficulties with Grover Beamer and Will Rakes both, some time ago, more than a year ago?

A. I had a little difficulty with Grover Beamer, I don't remember how many years ago, he was not yet grown.

Q. And you have been on bad terms with both of them, haven't you?

A. If they let me alone, I let them alone. I don't never bother anybody unless they bother me.

216 Q. How long was it after they left the northeast door before you heard the shooting?

A. It was right at once, I didn't have more than time to walk around there.

Q. Did Peter Hall stay at your house Saturday night?

A. No.

Q. What time did he come there?

A. He came there Sunday morning.

Q. What time did he leave there?

A. A little bit before 12 o'clock.

Q. Is it not a fact that up there at Roberson's store you had a row up there and were fined on account of your disorderly conduct?

A. Certainly I was, but nobody ain't nobody that won't take their own part.

Q. Was that in regard to the charge against Peter for stealing a pocketbook, or was it some other charge?

A. I don't know that he ever stold a pocketbook, he picked up one.

Q. Didn't you state here last week or week before last that Wm. E. Rakes, when he left the door, went around to the lower side of the house, on the east side?

A. I don't remember.

Q. Didn't you make that statement?

A. I don't remember.

Q. If you made the statement, was it true?

A. I don't remember making the statement.

Q. Do you deny making it?

A. I don't remember; I won't be positive.

217 Q. Where was Ann standing when she was shot in the breast?

A. I don't remember, somewhere near me, between the door and the fireplace.

Q. Which way was her face?

A. Her face was towards the fire when she fell.

Q. The fireplace is in the west end of the house?

A. Yes.

Q. Then she was looking west?

A. Yes.

Q. The door through which these shots were fired, that is on the southeast side, is it not?

A. No; the southwest side.

Q. How much higher is your house than the ground; how many steps do you have to take to get up in the house?

A. I got some rocks laid there and a puncheon laid on that.

Q. Is not your house about two feet from the ground?

A. I never measured; I don't remember.

Q. Is it as high as that table from the ground?

A. I don't remember.

Q. It is up off the ground, is it not?

A. Of course it is up off the ground.

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Q. How high is the window that you said the shots came through from the floor?

A. Between two and three feet.

Q. Did you ever measure it?

218 A. No.

Q. Why cannot you guess how high your house is from the ground, if you can guess about the window?

A. Because I ain't no hand to guess.

Q. How much taller is your sister Ann than you?

A. She was a little taller than me, but mighty little.

Q. Was your sister Ann standing, at the time she was shot, between the open door and the fireplace?

A. The best I can remember, she was.

Q. When she fell which way was she lying, was her head towards the door or the fireplace?

A. Towards the fireplace.

Q. How far from the hearth?

A. I didn't particularly notice.

Q. You don't remember?

A. No, sir; I don't.

Redirect examination by Mr. MOORE:

Q. You have been asked about several holes in the door; just point out those that were made.

A. That one was made, and that one, and that one there [indicating.]

Q. Do you remember how many times you have been asked to testify in this case?

A. No, sir; I don't remember now.

Q. I believe on some of those occasions, or several of them, your evidence has been written down, has it not?

A. Yes.

219 Q. Judge Hairston was reading from your evidence awhile ago as to how these people were dressed the night they came to your place. By reference to your evidence taken here on July 10th, before his honor, on a motion to bail the defendants, I think that at page twenty-three the folowing occurred; this question was asked you with reference to the party of men and dress: "Q. Did you see as many as five men in the yard? A. Yes. Q. Did you see as many as six? A. I don't know, I said five, I will be sure of that. Q. Did you count them? A. Yes. Q. While the shooting was going on and you standing in the door you counted them? A. No. Q. Were any shots fired in the east door? A. No; they came to the door. Q. How many men went around to the west door? A. I don't know. Q. How many went to the east door? A. I don't know; Grover busted the door open. Q. Were these people disguised at all? A. No. Q. How was Will Rakes dressed? A. He had on his every-day clothes, not shaved nor nothing." What did you mean by not being shaved?

A. Why, having a beard on his face.

Q. What kind of a beard did he have on his face then?
A. A dark beard, but not right black.
Q. A long beard or a short beard?
A. His moustache was sorter long, but his beard was not very long. Not very.
Q. Miss Jane, I read to you from page twenty-three, Motion for Bail, as follows: "Was Beamer in every-day clothes? A. I don't know, sir. Q. What sort of pants did he have on? A. Over-
220 alls. Q. You are very positive of that, are you not? A. Yes, sir; I know well enough it was Grover Beamer. Q. Which door was it that was broken down? A. West door." Now, does that seem to be what you said on that occasion, or do you remember?
(Witness nods, indicating "yes.")
Q. How old are you Miss Jane?
A. Between forty-two and forty-three.
Q. How old was your sister?
A. About fifty-six as near as I can guess at it. I can neither read nor write.

Recross-examination by Mr. STAPLES:

Q. How many shots did you say were fired?
A. Eight.
Q. Eight in all?
A. One that was not shot, that made nine.
Q. And you only heard eight?
A. Yes.

2 Direct examination by Mr. MOORE:

Q. Do you mean that there were eight shots fired with the one that killed the dog, or without that one?
A. Without that one.
Q. Then there were nine including that one, weren't there?
A. Yes.

221 The Government thereupon introduces as a witness:

GROVER BEAMER by Judge HAIRSTON:

We desire to object to the Government examining Grover Beamer. We represent him as your honor knows. An appeal is pending, the appeal is taken in good faith. We expect to appeal. We claim his constitutional exemption and that they can not make him testify unless he wants to.

By the COURT:

Unless you desire to testify you need not testify.
Q. What do you want to do, to testify or not. It is entirely as you wish. Do you want to testify or not testify?
A. No, sir.

By Mr. MOORE:

Q. Do I understand you to say you don't wish to testify?
A. Yes.

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Q. You are positive of that, are you?
A. Yes.
Counsel for Grover Beamer objects to this witness being further examined.
Objection overruled and point saved.
Q. How old are you?
A. Nineteen, the best I know.
Q. Where were you raised?
A. In Patrick County, mostly.
Q. Where does your mother live?
A. She lives in Floyd.
222 Q. Have you any brothers?
A. Yes.
Q. How many?
A. Three.
Q. What are their names?
A. Robert, Fred, and Frank.
Q. Is your father living?
A. No.
Q. Have you seen your mother recently?
A. Yes.
Q. When did you see her?
A. Just a while ago.
Q. You mean as you came from the jail here.
A. Yes.
Q. Did you talk with her?
A. Yes.

By Mr. STAPLES:

Are these questions relevant to this issue?

By the COURT:

I think so.

By Mr. MOORE:

Q. Do you know Mr. Charles P. Nowlin?
A. Yes.
Q. How long have you known him?
A. A good while; I don't know how long.
Q. Did you ever live with him?
A. Yes.
Q. How long?
A. About eighteen months.
223 Q. You lived with him about eighteen months. With whom else did you live in that part of the country?
A. With Mr. Robert Lee.
Q. What relation is Mr. Robert Lee to Mr. Nowlin?
A. Brother-in-law.
Q. How far does Mr. Lee live from Mr. Nowlin?
A. About one half a mile.

Q. How far does Mr. Charles Nowlin live from Charity?
A. About one mile.
Q. How far does Charles Nowlin live from where Miss Jane Hall lives?
A. About one half a mile.
Q. How far does Charles Nowlin live from Ben Hall?
A. About one half a mile.
Q. How far does Charles Nowlin live from Geo. Roberson's store?
A. About one mile.
Q. Will you please tell the jury whether you ever lived with Geo. Roberson?
A. Yes; I lived there part of the time.
Q. How long did you live there?
A. About two months. I didn't stay there all the time.
Q. You are one of the defendants in this case, aren't you?
A. Yes.
Q. Are you the same young man who was tried here last week or the week before?
A. Yes.
Q. Do you tell us or not that you don't want to testify further in this case?
224 A. Yes.
Q. You don't want to testify.
A. No.
Q. Is this your mother here who spoke to me just now?
A. Yes.

225 W. A. ELGIN by Mr. MOORE:

Q. Where do you live?
A. In Patrick County, in the Charity neighborhood.
Q. Do you know Miss Ann Hall and Miss Jane Hall?
A. I do.
Q. Do you know Wm. E. Rakes?
A. Yes.
Q. How far did he live from where Miss Ann lived at the time she was killed?
A. About three quarters of a mile.
Q. Tell the jury what you know of her death, the first you heard of it, and everything you saw concerning it.
A. At my home on Monday morning about four o'clock, Monday after the fourth Sunday in March, Mr. Robert Lee came to my house and told me of the tragedy and wanted me to go with him to the place of the murder, and I went with him. When I got there I found Miss Ann Hall lying in the door, dead, and Jane Hall, her sister, was below the house weeping.
Q. That was about four o'clock in the morning?
A. Yes; somewhere near four in the morning.
Q. Where was Miss Ann lying when you got there?
A. In the door. Part of her body was kinder across the door sill, you might say, her feet, I think, out on the ground.

Q. Did you see any wounds about her person?

A. Yes.

Q. What?

226 A. She seemed to be shot all about her body with small shot.

Q. What evidence of shooting did you see in the yard, if you did see any?

A. There were shells lying in the yard and the house was considerably riddled by gun shots, the doors of the house in several places was shot through.

Q. Do you identify the door I now point out to you as the one you saw there that morning?

A. Yes; that is the door.

Q. Describe the window.

A. The window lights seemed to be shot out or something had gone wrong with them.

Q. Did you find any glass in the house?

A. I think so, as well as I remember, there was some glass lying on the floor.

Q. What were the evidences of shots having been fired at the window on the outside?

A. You mean on the——

Q. The sash.

A. I am not so positive that I saw anything of any shots about the sash.

Q. But the glasses were out?

A. Yes.

Q. And the pieces in the floor, you say.

A. Yes.

Q. How many shells did you see in the yard?

A. I think we picked up 8 or 9.

Q. Who helped you to pick them up?

A. Mr. Robert Lee and possibly Ben Hall and maybe Gillie Thomas picked up some.

227 Q. Examine these that I now hand you and see whether they appear to be the shells or like the ones that you picked up.

A. I think so, at least they resemble the shells.

Q. Describe the size—the gage—of those shells to the jury.

A. I don't believe I can see the figures on here, but the shells we picked up were 12 and 16 gage.

Q. Are these not 12's and 16's also?

A. I think so. They are numbered by figures, are they not?

Q. You say you picked up eight?

A. Eight or nine, I am not positive. There was several that we picked up.

Q. What was the condition of the house, the furniture, etc.?

A. It was turned up considerably, some of it was lying out doors, part of the bed. Some other furniture was turned over, and molasses turned over in the floor; two firkins of molasses, I think.

Q. I hand you a representation of that house, a drawing. I would like for you to examine same—they were shown you once before—and

state to the jury whether that appears to be a reasonable, fair, and correct drawing of the house?

A. This seems to be as nearly correct as could be drawn of the house.

Q. There appears to be marks indicating, I presume, shots that were fired?

A. Yes; those are the shots. This is through the door and this represents the different sides.

Q. One of the drawings represents one side of the house, and the other the other side of the house, and you think them to be a fairly good representation of the house?

228 A. I think so.

Cross-examination by Mr. STAPLES:

Q. Did that chimney project outside from the wall of the house or the inside?

A. It was built on the outside.

Q. So that the face of the chimney was flushed with the wall on the inside, in other words, there was none of the chimney on the inside. About how high was that house from the ground?

A. The upper side where the window is at is right close to the ground, right at the ground, the other end is right high, two or three feet.

Q. As I understand, there was one step, and then up into the door; was that a short step from the puncheon or a long step?

A. It occurs to me like it was tolerable short, not over a foot.

Redirect examination by Mr. MOORE:

Q. How high was the lower part of the window from the ground?

A. Not over three feet. I said when I was here before between three and four, but since then I went to the house, I had occasion to go by there, and it is three feet.

Q. How high is the top of the window from the ground?

229 A. Not over five feet.

Q. The window, then, is something near two feet across from top to bottom?

A. I guess that is about right, it is a very small window.

230 GILLIE (J. W.) THOMAS by Mr. MOORE:

Q. Where do you live?

A. In Patrick County.

Q. How far from Charity?

A. About one mile.

Q. Did you know Miss Ann Hall?

A. Yes.

Q. What do you know about her being killed?

A. The morning of the 25th, Jane came after me and told me there come a crowd there and killed Ann.

Q. The 25th of what?

A. Last March.

Q. What time did Miss Jane come after you?
A. About two o'clock by my time.
Q. What did you do?
A. I went there and saw that she was dead and then went after Ben Hall. I and Jane and Robert Lee went there together.
Q. What was the condition of things when you got there?
A. They was tore up; the bed, one bed was lying bottom up; Ann was lying in the door.
Q. What was her condition?
A. Her feet were on the door step and the balance of her back in the house with some pillows under her head.

231 Q. Did you see any evidences of shooting upon her person?
A. Yes, sir; places with the blood running out.
Q. What evidences of shooting did you see outdoors?
A. I saw some shells, shot holes through the door of the house.
Q. Did you identify the door I now point out to you as one of the doors you saw that morning?
A. To the best of my judgment, it is.
Q. Where were the shells?
A. Four or five steps from the end of the house.
Q. Did you or not gather up some of them?
A. No; I didn't pick up any, but I was present.
Q. Please examine these and see whether they appear to be the shells that were picked up that morning.
A. They will do; they are like the ones that we picked up.
Q. What was the size of the shells that were picked up?
A. 12's and 16's.
Q. How many did you pick up?
A. Eight empty shells, one loaded one.
Q. Do you remember anything about the dog?
A. Yes; the dog was lying there with the blood running out of his shoulder.

Cross-examination by Judge HAIRSTON:

Q. Which end of the house did you find the shell nearest to—the west end?
A. Yes; above the house. I reckon it is north.
Q. You didn't find any of them in front of that door yonder, did you?
A. No.

232 BEN HALL by Mr. MOORE:

Q. Where do you live?
A. In Patrick County.
Q. How far from where Miss Ann Hall was killed?
A. About one-half mile.
Q. Do you remember when she was killed?
A. It was in March.
Q. How soon after she was killed did you know of it?

A. I suppose something like one-half hour. Mr. Thomas came for me.

Q. What did you do?

A. I put on my clothes and went up there with him.

Q. What was the condition of things when you got there?

A. The woman was lying there in the door dead when I got there, and the property in the house seemed like it was generally torn up.

Q. What evidence of shooting did you see outside of the house?

A. I think there was four holes in the end of the house and three in the door, and I found some cartridges there next morning.

Q. How about the window?

A. The light was shot out of the window.

Q. How many cartridges did you find next morning?

A. Three.

Q. Were any other found except those three?

A. Yes, nine were found in all.

Q. Please examine the ones I hand you and say whether
233 they appear to be the ones that were found there that morning?

A. Of course I can not swear they are the very same ones, only they look like them.

Q. What was the size of the shells you found there that morning?

A. 16's and 12's.

Q. Did you see the dog?

A. Yes.

Q. What about the dog?

A. The dog was shot.

Cross-examination by Judge HAIRSTON:

Q. Did you see anything of a still cap there in the yard?

A. Yes.

Q. Where was it?

A. Not exactly in the yard, at the edge of the yard.

Q. How many shots do you think were fired through the window?

A. I can not tell.

Q. More than one?

A. I could not say.

234 GEO. BRAMMER, by Mr. MOORE:

Q. Do you know Wm. E. Rakes?

A. Yes.

Q. How long have you known him?

A. I have know him for twenty or thirty years; all my life.

Q. How far do you live from him?

A. About one and a quarter miles, I reckon.

Q. Do you know what kind of a gun he owned last winter and spring?

A. Yes.

Q. What kind of gun was it?

A. A repeating shotgun.

Q. What make?
A. A Winchester.
Q. What size?
A. Twelve gage.

Cross-examination by Judge HAIRSTON:

Q. Do you know of anybody else in that neighborhood that owns a shotgun?
A. Yes.
Q. Who?
A. Mighty nigh everybody; that is the majority of them.
Q. The majority of them are 12 gage.
A. Several of them 12's and a heap of them 16's—all kinds.
235 Q. The twelve gage and the sixteen gage are the most common guns ordinarily used by everybody?
A. Yes.

Redirect examination by Mr. MOORE:

Q. Do you know what kind of a gun Grover Beamer had?
Counsel for defendant objects.
Objection overruled.
A. No.
Q. How many repeating Winchester guns were there around there?
A. Not another one anywhere close around that I know of.
Q. Do you mean to say that Rakes' was the only repeating Winchester shotgun that you know of in that neighborhood?
A. No; I know of one more. Monroe Smith had one, if I am not mistaken.
Q. Were they the only ones, Monroe Smith's and his?
A. Yes.
Q. How many years has it been since you knew of his having one?
A. I think Smith has had his two or three years.

Recross-examination by Judge HAIRSTON:

Q. You use the same kind of shell in repeating shotguns that you do in the ordinary shotgun, don't you?
A. Yes.

236 GEO. L. ROBERSON, by Mr. MOORE:

Q. Where do you live, Mr. Roberson?
A. At Charity, in Patrick County.
Q. How far from where Miss Ann Hall was killed?
A. About ¼ mile.
Q. Do you remember the night she was killed?
A. Yes.
Q. What is it that helps you to recall it?
A. My wife was sick, and I was up and down the principal part of the night.
Q. Did you hear any shots?
A. Yes.
Q. How many?

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A. Nine.
Q. What time of the night were these shots fired?
A. Between one and two o'clock.
Q. Does Grover Beamer live with you?
A. No.
Q. Did he live with you at that time?
A. He worked for me a few days.
Q. How much did he stay with you?
A. From Xmas up to the time of the killing, he stayed there two or three months.
Q. Did he occupy a room at your house or store?
A. He would sleep with my brother of a night and worked for me a few days. When he worked for me he always slept with my brother, but he didn't have any room to himself.
Q. What kind of a gun did Grover Beamer have?
237 Counsel for defendant objects.
Objection overruled and point saved.
A. I could not state positively. I sold him some 16 gage shells, but as to his owning a gun, I don't know that he did.
Q. You don't know of his owning a gun?
A. No.
Q. Don't you know of his owning a gun while he worked at your place?
A. No; I sold him some 16 gage shells, but as to knowing he had a gun, I don't know it.
Q. Don't you know he had a gun in his possession and control?
A. I heard that he had.
Q. Didn't you see him with a 16 gauge gun?
A. I could not state positively that I did.
Q. You didn't see him with a gun?
A. He has been by the store with a gun, but I didn't see him.
Q. You think before Miss Ann was killed that you sold him some 16 gage shells?
A. Maybe a week or maybe not that long.
Q. How many did you sell him?
A. I sold him a box.
Q. Did I understand you to say that Grover Beamer and your brother slept together there?
A. Yes, when he was there; yes, sir.
Q. What is your brother's name?
A. Henry Roberson.
238 Q. Is he the same Henry Roberson who is referred to here as having been at Miss Jane Hall's the day before this shooting occurred?
A. He is the same one I reckon.
Q. So when Grover Beamer was at your place, he and your brother, Henry Roberson, slept together?
A. Yes.
Q. You stated you remember when this shooting occurred?

A. Yes.
Q. Where was Grover Beamer the morning after the shooting?
A. He came to my store.
Q. At what time did he come there?
A. About nine o'clock as near as I can state it.
Q. Did he have his gun with him?
A. No, he didn't.
Q. From what direction did he come?
A. If I am not mistaken he came from in the direction of Halls. He came by the road.
Q. Were you at the inquest?
A. Yes.
Q. Were there many people at that inquest?
A. Yes, thirty or forty, probably more.
Q. That was held the day after this old lady was shot?
A. Yes.
Q. Did you see Grover Beamer at the inquest?
A. No.
Q. See Will Rakes, the defendant?
A. No.
239 Q. See Peach Rakes there?
A. No.
Q. How about Geo. Booth?
A. I never saw him.
Q. How about Geo. Martin?
A. No, sir.
Q. How about Charlie Turner?
A. I don't think Charlie Turner was there. He was at the trial the next day. I don't remember seeing him at the inquest.
Q. At the time of the shooting where was Grover Beamer living, with you or with Mr. Nowlin?
A. He was just from place to place and had no regular job, and the last time he was at my place, I mean to stay there, was something a week before; he never stayed at my place Saturday or Sunday night, and I don't remember about Sunday.
Q. How did you hear of this shooting first?
A. Robt. Lee came to my house about four o'clock.
Q. Had you gone to bed?
A. Yes.
Q. You had been up and down the fore part of the night?
A. Yes, my wife had a sick headache, and I got up about midnight and got some headache powders from the store.
Q. When you went to the store did you see anyone?
A. No.
Q. How far was your store from where Miss Ann was shot?
240 A. About ½ mile.
Q. Did you hear anyone pass your place that night?
A. No; not after I went to bed, after night.
Q. Did you see Grover Beamer Sunday evening?

A. Yes.
Q. Where?
A. He was at my place.
Q. What time did he leave your place?
A. Late in the evening.
Q. How late?
A. Between sundown and dark, I suppose.
Q. Then he left your place between sundown and dark. When was the next time you saw him?
A. Next morning between nine and ten o'clock.
Q. You have not told us when was the next time.
A. That was the next time.
Q. Where did Beamer stay Saturday night?
A. I don't know.
Q. Where did he stay Sunday night?
A. I could not tell you.
Q. Do you remember any kind of public gathering at Charity on Saturday before this killing?
A. Yes; school breaking.
Q. Was Grover Beamer there?
A. Yes.
Q. Was Will Rakes, the defendant, there?
A. Yes.
Q. Was Peach Rakes there?
241 A. No; I don't remember seeing him; I don't think he was there.
Q. Did you see Mr. Charles Nowlin there that day?
A. Yes.
Q. Charles Turner?
A. Yes.

Cross-examination by Judge HAIRSTON:

Q. At this school breaking it is usual for everybody to attend, is it not?
A. Yes, the whole neighborhood was there that day.
Q. Who was the teacher of that school?
A. J. D. Cochran.
Q. Mr. Moore asked you about selling some 16-gauge shells. You sold those shells to other people, did you or not?
A. Yes.
Q. It was about squirrel hunting time and they were right salable?
A. Yes.
Q. Both gauges 12 and 16.
A. Yes.
Q. Do you remember how many boxes of shells, both 12 and 16, you sold during the months of March and April?
A. About the only way I can come to it, I generally buy about a couple of thousand at a time and I sell about that many every three months. I think my books would show it.

242 BENN HALL (recalled) by Mr. MOORE:

Q. I forgot to ask you about Grover Beamer's gun. What kind of a gun did he own last spring at the time of this killing?

A. He owned a 16.

Q. What make was it?

A. It was a Buck Eye.

Q. You remember the gun that you testified to here on the other trial, don't you?

A. Yes.

Q. Did you identify that gun as his?

A. It looked like one I had seen him with.

Counsel for the defendant objects to the introduction of a gun in evidence that has not been identified.

Objection overruled and point saved.

Q. I now show you the 16-gage Buck Eye gun that you have heretofore referred to in your evidence; please examine the gun and say whether or not that appears to be the gun that belonged to Grover Beamer?

A. It looks like the gun I seen him with.

Q. When was the last time you saw him with it?

A. I don't remember.

By Mr. MOORE:

At this place we would like to introduce the gun and the shells. We have one more witness, Mr. Hooker, but he is not here.

By Mr. STAPLES:

We have no objection to the shells.

243 Objection overruled as to the introduction of the gun and the same is thereupon introduced in evidence.

Cross-examination by Judge HAIRSTON:

Q. Is that the only 16-bore gun you know of?

A. No; there is plenty of them up there.

Q. Plenty of the 12-bore guns?

A. Yes.

244 GORVER BEAMER (recalled) by Mr. MOORE:

Q. Mr. Beamer, I believe you were sworn a while ago?

A. Yes.

Q. Do you want to testify now in the case?

A. No.

GEO. L. ROBERSON (recalled) by Mr. MOORE:

Q. What make of shells was it that you sold at your store?

A. New Club.

Q. And by what concern were those made?

A. Union Metallic Company.

Q. How were they marked?

A. On the end of the shell was "UMC."

Q. Is this the same make of the shells that you sold then?

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A. Yes.

Q. What kind of a night was that that you heard those nine shots, the night Miss Ann Hall was killed?

A. A bright night, a bright moonshiny night.

By Mr. MOORE:

We desire to call to the attention of the jury also the fact that this gun bears upon it the name Buck Eye.

With permission to introduce Geo. Dickerson and Mr. Hooker when they come, the Government rests.

245 By Mr. STAPLES:

We desire to make motion for the exclusion of the evidence upon the grounds that we have discussed before the court on several former occasions. Possibly I had better put my motion in full form.

We desire to move the exclusion of all of the testimony of the Government, on the ground that there is not sufficient evidence to make out a prima facie case of a conspiracy by two or more persons with intent to intimidate any person from or on account of the exercise of any of the rights secured to him by the Constitution or laws of the United States.

And we move to exclude all and several, the questions and answers which have been objected to, and which objections have been overruled from time to time during the trial, for the reasons assigned at the time of making said objection.

The motion of counsel for defendant is overruled and the point saved.

246 And the defendant thereupon introduces the following testimony:

GEO. L. ROBERSON, by Mr. STAPLES:

Q. Are you acquainted with the reputation of Jane Hall for truth and veracity in the vicinity of her home?

A. Yes.

Q. Is that reputation good or bad?

A. Bad.

Q. Is it bad or very bad?

A. I consider it very bad.

Q. From that reputation would you believe her upon oath?

A. No; I could not.

Q. How long have you known her?

A. I have been knowing her all my life.

Q. Are you acquainted with the reputation of Peter Hall for truth and veracity in that vicinity?

A. Yes.

Q. Is that reputation good or bad?

A. Bad.

Q. Is it bad or very bad?

A. I consider it very bad.

Q. Would you believe him upon oath upon that reputation?

A. No.

Q. How long have you known him?
A. For seven years.
Q. Are you acquainted with the reputation of Sam Hall for truth and veracity in that community?
247 A. I have been knowing Sam, but don't know him as well as the rest of them.
Q. From what you know of that reputation would you believe him upon oath?
A. I hardly think I could.
Q. How long have these parties enjoyed that reputation in that community?
A. Ever since I knew them.

Cross-examination by Mr. MOORE:

Q. I suppose you have heard Mr. C. P. Nowlin say their reputation was bad?
A. Maybe I have.
Q. Didn't Mr. Nowlin have you summoned before the trial of W. E. Rakes to make that statement?
A. I don't know as he did.
Q. You have heard Wm. E. Rakes say it was bad?
A. I don't know as I have.
Q. Did you ever hear Mr. Nowlin say it was bad?
A. If I did I don't remember it.
Q. You have not heard Grover Beamer say it was bad?
A. I don't know as I ever talked with any of these parties about them. But I have talked with other people.
Q. What gentlemen have you heard say it was bad?
A. Tyler Rakes.
Q. Who is Tyler Rakes; isn't he a moonshiner?
A. No.
Q. Has not he been in the whiskey business all his life?
248 A. I don't know that he has.
Q. What relation is Tyler Rakes to these defendants?
A. He is related to Wm. E. Rakes, but not to Beamer that I know of.
Q. What relation is he to C. P. Nowlin?
A. I suppose he is related to him.
Q. Now name somebody else that you have heard say the reputation of these people was bad.
A. John W. Thomas.
Q. When did you hear him say that?
A. About a year ago.
Q. And you never heard Mr. Nowlin say so?
A. It might be that I have, but I cannot recall the time.
Q. How many of those people that you have heard say that the reputation was bad were engaged in a whiskey business?
A. I have heard people say it who never handled liquor, Gillie Thomas and W. A. Elgin.
Q. You also heard Mr. Elgin's statement qualified, didn't you?

POOR C

A. No.
Q. You have heard Mr. Elgin say——
Objection overruled and point saved.
Q. Mr. Roberson, I believe you stated yesterday that Grover Beamer lived with you?
A. I didn't consider that he lived with me. He worked there a few days.
249 Q. Didn't he make your house his home part of the time?
A. You can consider it any way you want to. He stayed there about three weeks.
Q. At the time this murder was committed he was making your house his home?
A. He stayed there a few weeks before.
Q. You were up that night and heard shots?
A. Yes.
Q. And Grover Beamer was not at your house the night of the shooting or the night before the shooting. Is it not a further fact that at the time this offence was committed that you had Grover Beamer's money?
A. Yes; I didn't have any money. I had some papers, notes, that belonged to him. I have a safe and he left them there to be put in the safe.
Q. Didn't you state that at that time the De Harts were refused license by the State authorities to run distilleries in your neighborhood and that you would sell your stock of goods for $500.00 less than you would the day before?
Objection overruled and point saved.
A. No; I didn't say that. I said I would sell my place. I didn't say my stock of goods.
Q. Then some distillers named De Hart in your neighborhood were refused license by the State authorities and you said that you would sell your stock of goods for $500.00 less than you would the day before. Tell the jury whether you have any sympathy for these distillers.
250 A. I have sympathy for the licensed men to handle fruit and grain?
Q. You admit that sympathy?
A. Yes.
Q. Have you any sympathy for the blockade distillers?
A. It might be that I have.
Q. Is it not a fact that you sell quite a quantity of material to illicit distillers in your neighborhood? Tell the jury that you sell to them malt and material for distillation.
A. I have sold corn and stuff like that, but I didn't know what they were going to do with it.
Q. Haven't you sold malt to a number of people who were not running bonded distilleries?
A. Yes.

Q. What else could they do with it except to use it for blockade distilleries?

A. I don't know.

Q. Do you know of anything else they could do with it?

A. No.

Q. How many other people in that community did you hear say that the character of Jane Hall was not good?

A. I don't know of any others.

Q. Give us the names of the parties who purchased malt from you that were not registered distillers.

A. I don't know.

251 Q. Do you own any stock in that De Hart matter, that was going to depreciate so much?

A. Yes.

Q. How much?

A. $2,000.00.

Redirect examination by Mr. STAPLES:

Q. What is Mr. Tyler Rakes' business?

A. He is a farmer.

Q. What is his standing in the community?

A. I consider it good.

Q. As good as any man in the county?

A. Yes.

Q. Who did he marry?

A. The daughter of W. C. Hooker, treasurer of Patrick County.

252 W. A. ELGIN by Mr. STAPLES:

Q. You testified before in this case?

A. Yes.

Q. You are a minister of the gospel?

A. Yes.

Q. Are you acquainted with the reputation of Jane Hall for truth and veracity in the community in which she lives?

A. Yes.

Q. Is that reputation good or bad?

A. The people generally say it is bad.

Q. From that reputation would you believe her on oath?

A. I would have to answer that question like I did here before, that if it was backed up by good evidence I would have to believe her. If she was interested in it, I would not like to believe her.

Q. How long has she held that reputation?

A. I never heard so much said about her until a few years back, she was always reported as a rowdy woman who was making whiskey.

Q. From what you have heard of her for a few years back, do you consider her reputation bad?

A. I would suppose so from what others say.

Q. Are you acquainted with the reputation of Peter Hall in that community for truth and veracity?

A. Yes.

253 Q. Is his reputation good or bad?

A. Bad.

Q. Would you believe him on oath?

A. I would not like to.

Q. Are you acquainted with the reputation of Sam Hall for truth and veracity?

A. Not so well.

Q. Are you acquainted with his reputation in that vicinity?

A. Not until recently. I know him but never came in contact with him and have not heard much said about him until recently.

Q. He is nothing but a boy?

A. No, sir.

Cross-examination by Mr. MOORE:

Q. You say Miss Jane would fight if it were necessary?

A. It is reported so.

Q. It was almost necessary sometimes, too, in that country?

A. I could not say that it was.

Q. What kind of people was it there in that country that gave her a bad name. Was it blockaders or Christian people like you, members of the church?

A. It was the general talk that she was rowdy and would blockade and was bad that way.

Q. Have you heard Mr. Nowlin talk about Miss Jane—C. P. Nowlin.

A. I think I have.

254 Q. How much of this talk started with Mr. C. P. Nowlin, do you know?

A. I could not tell you.

Q. I believe there was some trials in which Wm. E. Rakes was interested in that Miss Jane figured in.

A. There was a trial in the family some way, in the Rakes family.

Q. I mean in the Hall family, between Peter and Rakes. Do you know how much of that talk originated there?

A. No.

Q. It is a fact that that community has a very great many violators of the internal-revenue laws in it, has it not?

A. Yes; that has been said. There have been people there that have not been keeping the law like they should.

Q. Is it or not a fact that law-abiding citizens like you would testify upon the stand against these people, and I will say against Rakes, Beamer, and Charles P. Nowlin, and people of that kind, with more or less hesitation and trepidation on account of fear of injury to their persons or their property?

A. I would not like to testify against them in a matter of blockading or the like. I had rather not.

Q. Why would you rather not?

A. The sentiment of the people, especially the blockaders there, they don't like to be prosecuted for violating the law in making whiskey. They have been kinder trained up that way and it seems it is hard to get them out of it.

255 Q. You have been called here by the Government to testify in this case. Would you not greatly prefer, for the safety of yourself and your property, that you had not been called as a witness?

A. In this case I don't know as I would. Of course I would much prefer not to be a witness in the case, but I would not hesitate to tell the truth with regard to these people in this case.

Q. On the former occasions I believe you put it this way: That while you would hesitate, still you would tell the truth.

A. Something like this, that it would not hinder me from telling the truth.

Q. If Grover Beamer and W. E. Rakes were at large and you had testified against them would not you hesitate for the safety of yourself and your family?

A. In what way?

Q. If they were at large.

A. No; I don't have that opinion of them. As I said before I would not like to go where they were making whiskey and then report them, but in a case like this I don't think I would be uneasy.

Q. Have you a family?

A. Yes.

Q. Do you own property there in that country?

A. Yes.

Q. How far is it located from C. P. Nowlin?

A. One mile or three-quarters of a mile.

Q. How far from W. E. Rakes?

A. About two miles, or one and a half.

256 Q. You stated a while ago that if Miss Jane's evidence or Peter Hall's evidence was supported that you would have no hesitation in believing it. You would have no hesitation in believing that Miss Ann was killed if Miss Jane told you so under those circumstances, would you?

A. Why, of course. I saw it.

Q. If Peter had told you there was a blockade still there and you should go and see it, you would have no hesitation in believing it, would you?

A. No.

Q. You can not tell us, then, now much of this reputation as unfavorable has been made by the blockaders there?

A. I am under the impression that some of it has.

Q. How much of it you don't know?

A. No. I believe that if Peter Hall had let the blockaders alone he would not have had quite as bad a name as he has got.

Q. If Miss Jane had not done so, would she have had as bad a reputation as she has?

A. As to Jane, I don't know that she ever meddled with them in the way of blockading.

Q. Is she were not compelled to testify in this case, as she has been compelled in four or five trials, would she have as bad a reputation for truth and veracity as she has?

A. Of course this has had something to do with it, but she had a little bad reputation before this occurred. There was some talk about her before this occurred.

257 Q. Since this occurred there has been an immense amount of talk?

A. Oh! Yes, a great deal more.

Redirect examination by Mr. STAPLES:

Q. If you had heard Jane Hall testify before this year, before any of these things occurred, in a matter in which she had any bias or prejudice, would you have believed her upon oath?

A. If she had been caught up stilling and making whiskey and brought before the courts and she thought she could free herself by testifying falsely, I am under the impression she would have done it.

Q. Does the hesitation you have against testifying against illicit distilleries extend to all the distilleries in that vicinity?

A. I would not like to testify against any of them.

Q. Is it not a fact that the people in that community and in the adjoining county all believe that they have the right to make whiskey and that the laws are a hardship upon them?

A. A great many do. I have heard them so express themselves.

Q. Are they not an uneducated people?

A. To a great extent.

258 Recross-examination by Mr. MOORE:

Q. Do not a great many of these same people think that they have the right to burn the homes of informers and shoot them down and has not that occurred right in that neighborhood?

A. I could not say that they think they have the right to do this, but it has been done.

Q. Haven't they burned the homes of informers, and haven't they shot them down——

Objection.

Sustained.

259 [illegible] THOMAS by Judge HAMILTON:

Q. Where do you live?

A. I live in Patrick County, near Charity.

Q. How long have you lived in that neighborhood?

A. All my life.

Q. What is your business?

A. A farmer.

Q. Do you know the character of Jane, Peter, and Sam Hall for truth and veracity; the reputation in the neighborhood in which they live?

A. I don't know so much about Sam Hall, not so much about him as I do about Jane and Peter Hall. They don't stand well in the neighborhood.

Q. From what you know of their reputation for truth and veracity, the reputation of Jane and Peter Hall, would you believe them on oath?

A. No; I could not.

Q. How long have they had that reputation?

A. I can not tell you; it has been a right smart little while.

Q. As much as a year ago.

A. Yes; more than a year ago.

Cross-examination by Mr. MOORE:

Q. Can you remember anyone who said anything about the reputation of Sam Hall for truth and veracity as far back as one year ago?

A. I don't know as I can.

260 Q. Now, then, let us take up Peter Hall, and I am directing your attention to one thing; not mixing it with anything else at all; can you recall anyone who said anything about his truth and veracity, I mean truth, as far back as a year ago?

A. I don't know as I can.

Q. Please tell us if you can how much of this bad reputation that is lodged against these three witnesses was made by the blockaders up there in that country—the violators of the law?

A. I don't know whether they are blockaders or not; they are accused of it.

Q. So the people who are accused of being blockaders have made this bad reputation?

A. Yes.

Q. Is it not a fact that all witnesses, and I might say you among them, would testify in this court against these defendants and any other blockaders in that country with some hesitation, and that hesitation based upon fear of injury to your property and your person or to your families? Is not that a fact?

A. Yes; I reckon it is.

Redirect examination by Judge HAIRSTON:

Q. You have never been engaged in the whiskey business?

A. I have been engaged in it some.

Q. How long ago?

A. Fifteen years.

Q. Is it not a fact that some of the best people in that community have handled whiskey?

A. Yes; said to be.

Q. Is it or not a fact that the people from whom you have
261 heard this reputation of Jane and Peter Hall are considered the very best people in that community?

A. Yes; I reckon so.

262 BEN HALL by Judge HAIRSTON:

Q. Where do you live?

A. In Patrick County.

Q. How far from Charity?

A. About one mile.

Q. How long have you lived there.

A. About three years.

Q. What is your business?

A. Farmer.

Q. Do you know the reputation of Jane and Peter Hall and Sam Hall for truth and veracity in the community in which they live?

A. It is counted pretty bad.

Q. From what you know of them if they were mad with anybody or interested in anything would you believe them on oath?

A. No; I could not.

Cross-examination by Mr. MOORE:

Q. I believe Mr. Hall that you are not interested in any way in the liquor business?

A. No.

Q. Have you ever been at any time in your life?

A. No.

Q. I believe you own a farm there.

A. No, I live on Mr. Walter Thomas's land.

Q. Have you a wife?

A. Yes.

263 Q. How many children?

A. Three.

Q. How far do you live from W. E. Rakes?

A. Don't know exactly—three or four miles.

Q. How far do you live from C. P. Nowlin?

A. About one-half a mile or a little over.

Q. How far do you live from where Miss Ann Hall was murdered?

A. About one-half a mile; maybe a little further.

Q. Can you tell us how much of this reputation, that you have referred to, is based upon statements made by blockaders up there in your country; that is, men who run illicit distilleries and who have been interested in illicit distilleries and selling whiskey in violation of the laws of the United States. How much of that reputation is based upon the sayings of those people.

A. I don't know as I could say.

Q. Is it not a fact that almost every one with the exception of your preacher up there and Mr. Gillie Thomas, possibly one or two others, that has ever said anything about the reputation of these witnesses, is either a blockader or accused of blockading.

A. I could not say.

Q. How many times has Mr. C. P. Nowlin talked to you about their reputation?

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A. I don't know as he ever has.
Q. You say you have a wife and three children there?
A. Yes.
Q. How long have you lived in that country?
264 A. About three years.
Q. Where were you living at the time that Mr. Geo. Via's house was burned?
Counsel for defendant objects.
Objection overruled and the point saved.
A. I was living in Patrick.
Q. In the same neighborhood in which you now live?
A. Pretty much but not at the same place I am living at now.
Q. Have you any fear or hesitation, that is fear of damage to your family or to you personally if you were to testify against these defendants in this case?
Counsel for defendant objects on the ground, first, that it is irrelevant; second, that Mr. Hall is a witness against this defendant and has testified upon the stand.
Objection overruled and point saved.
A. No, sir; I could not say that I would have.
Q. Do you answer that question without any hesitation?
A. I will explain it just the way it is. I was at one time accused of being a reporter and at that time I was afraid.

By the COURT:
Gentlemen of the jury, you will disregard the last statement of the witness.

265 GEO. NOLEN by Judge HAIRSTON:
Q. Where do you live?
A. I live in Patrick County.
Q. How far from Charity Church?
A. About three miles.
Q. How long have you lived there?
A. Fifty odd years, all my life.
Q. You are a brother of C. P. Nowlin?
A. Yes.
Q. You are a brother-in-law of J. C. Hooker, the Commonwealth's attorney of that county, are you?
A. Yes.
Q. The brother-in-law of W. E. Hooker, the treasurer of that county, are you not?
A. Yes.
Q. Do you know the reputation of Jane, Peter and Sam Hall for truth and veracity in the neighborhood in which they live?
A. I reckon I do.
Q. Is that reputation good or bad?
A. I should think it was bad.
Q. From your knowledge of their character would you believe them on oath in a case in which they were interested or had prejudice?
A. No.

POOR C

Cross-examination by Mr. MOORE:

Q. Judge Hairston asked you about nearly all of your relatives, suppose I ask you about some of them. I believe you are also related to W. E. Rakes' or his wife, are you not?

A. Yes.

266 S. L. TURNER by Judge HAIRSTON:

Q. Where do you live?

A. In Patrick County.

Q. What relation are you to W. E. Rakes?

A. We are brothers-in-law.

Q. What official position do you hold in the county of Patrick?

A. Commissioner of revenue, Smythe's River district.

Q. How long have you held that position?

A. About five years.

Q. How far do you live from Charity?

A. Something near five miles.

Q. Do you know the reputation of Jane, Peter and Sam Hall in the neighborhood in which they live for truth and veracity?

A. I have heard a good deal said about them.

Q. You speak from what you have heard and nothing from your own knowledge?

A. Yes.

Q. From your knowledge of their character for truth and veracity would you believe them on oath in a case in which they were interested?

A. Unless there was some other corroborating evidence, I could not believe them, from what the neighbors say.

Cross-examination by Mr. MOORE:

Q. I believe you said you are a brother-in-law of Wm. E. Rakes?

A. Yes; we married sisters.

Q. The one who is on trial?

A. Yes.

267 TYLER RAKES by Judge HAIRSTON:

Q. Where do you live?

A. In Patrick County.

Q. How far from Charity post-office?

A. About three miles.

Q. How long have you lived in that neighborhood?

A. All my life, I was raised in four miles of Charity.

Q. What relation are you to Wm. E. Rakes the defendant in this case?

A. We are said to be cousins.

Q. What is your business.

A. Farmer.

Q. Haven't you been in the mercantile business also?

A. Yes, sir; I sold goods nearly four years once.

Q. I believe you are the son-in-law of Mr. Hooker, the treasurer of the county.

A. Yes.

Q. Are you acquainted with the character and reputation for truth and veracity of Jane, Peter and Sam Hall in the neighborhood in which they live.

A. Yes.

Q. Is that good or bad?

A. It is said to be bad.

Q. From your knowledge of their reputation would you believe them in a case in which they were interested, had bad feeling or prejudice against the party?

A. No; I don't think I could.

Cross-examination by Mr. MOORE:

Q. Your relationship then is cousin to W. E. Rakes?

268 A. Yes.

Q. What other relationship is there; are not the families intermarried?

A. Not that I know of.

Q. What is your present business?

A. I am a farmer.

Q. Have you been taking any interest in this case?

A. No.

Q. You have not?

A. No.

Q. Do you feel any interest in the outcome of the case?

A. Why, I don't know anything about the case. If he is innocent I would like to see him acquitted, and if guilty I think he ought to be punished.

Q. Have you been taking any interest in the case?

A. No.

Q. You know Mrs. Mollie E. Rakes, don't you?

A. Yes.

Q. A widow lady living up there?

A. Yes.

Q. And a witness here for the Government?

A. Yes.

Q. How far does she live from you?

A. About one mile.

Q. You knew she was summoned here as a witness?

A. Yes; she told me so.

Q. Where was it she told you she was summoned?

A. I think it was up there at her house.

269 Q. Was that the only time you talked with her about this case?

A. I didn't talk with her about it then.

Q. Now, she told you she was summoned?

A. Yes.

Q. What was the etxent of that conversation?

A. I could not tell you only what I have told you.

Q. And what was that?
A. Only that she was summoned to court.
Q. Is that all?
A. All I can remember.
Q. Didn't you say to her that if we would all stand together we can get these boys out of this trouble?
A. No.
Q. You didn't say that then or at any other place?
A. No.
Q. Did you stop there at her house to talk with her?
A. I think I stopped in the yard in the path.
Q. And all of that conversation you can remember is——
A. She told me she had to go to court.
Q. You say you didn't see her at any other time?
A. Yes; I have.
Q. But didn't talk with her about the case?
A. No.
Q. Didn't you see her once when she was starting to Stuart and talk with her about this case?
A. No; I don't have any recollection of it.
Q. You say you didn't talk with her about this case at any other time only the time you referred to?
270 A. Yes.
Q. Do you remember when the trial of the case was at Stuart before the United States commissioner?
A. I heard of it. This trial pending?
Q. Yes.
A. I heard of it.
Q. Haven't you a soapstone quarry somewhere in the neighborhood of Mrs. Rakes'?
A. I have not.
Q. But is not one there?
A. Yes.
Q. Were you not there on one occasion when she passed?
A. Yes.
Q. Was not she on her way to Stuart then?
A. No. She told me she was on her way to Mr. Lafayette Simons's.
Q. And about that time didn't you say this to her: "You are out for Stuart, aren't you," and she said to you, no; and then you repeated it to her again, "Out to Stuart," and didn't you finally say to her that if everybody would keep their mouths shut, or words to that effect, that the boys would get out of this?
A. No; I asked her if she was going to Stuart. She said no. I said if she was I wanted to send some word to Mr. Murray Hooker.
Q. So you said nothing about the case?
A. No; I said nothing of that kind.
Q. How far was that from the soapstone quarry?
A. About one hundred yards or so.

Q. Was that at the place that is called near the head Old Lane?

271 A. Yes.

Q. And near the creek, too, isn't it?

A. Yes; within two or three hundred yards of the creek.

272 JAMES JAMERSON by Judge HAIRSTON:

Q. Where do you live?

A. In Patrick.

Q. How far from Charity?

A. Five miles.

Q. Are you acquainted with the reputation for truth and veracity of Jane, Peter, and Sam Hall in the neighborhood in which they live?

A. Yes.

Q. Is that reputation good or bad?

A. Bad.

Q. From that reputation would you believe them on oath in a case in which they were interested or had prejudice?

A. No.

The defendant next offers as a witness in this case Mrs. Wm. E. Rakes, wife of the defendant. Counsel for the Government object to the competency of the said witness and the objection is sustained and the witness not allowed to testify.

To which ruling of the court the defendant then and there excepted.

273 The defendant thereupon offers as a witness J. J. Brammer and other witnesses with the view of establishing the reputation of Peter Hall as a bad citizen and an undesirable member of the community.

By Mr. STAPLES:

We propose to prove by this witness in response to the following question: "Are you acquainted with the general reputation of Peter Hall in the community in which he lives, as to his being a desirable or an undesirable citizen," and "What is that reputation?" and subsequent questions in the same line, that Peter Hall was a notorious and offensive character in the community; that he was a general trespasser and petit thief and a reckless character. That the better people in the community were afraid to leave their homes unprotected because of the dangerousness of the said Peter Hall, and that the said Peter Hall had made threats against parties, other than the defendant in this case or the parties charged in the indictment, that he would destroy their property, and that such parties took precautions to prevent such destruction. This is offered to be proven by this and other witnesses.

By the COURT:

For the reasons stated in sustaining an objection to same question put to the witness, James Jamerson, the objection to this question is

sustained and matter expected to be proven by counsel for the defendant will not be allowed to be introduced into evidence.

The question put by counsel for the defendant to the witness,
274 James Jamerson, in the case of United States against Grover Beamer was as follows: "Q. What is the general feeling in the community with respect to Peter Hall as a desirable or undesirable citizen?"

By Mr. MOORE:

Is that res gestæ? I am prepared to be heard upon it.

By the COURT:

I must hear the Government.

By the COURT:

After hearing argument of counsel, I am constrained to sustain the objection to this testimony. Mr. Wigmore's statement, vol. 1, sec. 141, is, I think, a statement of what he believes the law should be rather than what the law is. I am satisfied that the great weight of authority now, and certainly in 1789, was that evidence of threats by persons not shown to have been connected with the offense, or evidence of a motive on the part of third persons not connected with the offense, is inadmissible. However, in order that the defense may meet the charge in the indictment to the effect that the motive—the reason for the alleged conspiracy—was the fact that Peter Hall was an informer, it would be inadmissible for the defense to introduce evidence tending to show that this defendant, or any of the five people mentioned by the witnesses as the conspirators, had been injured by Peter Hall, and therefore probably had a cause for desiring to kill him or run him out of the country other than because of his having acted as an informer. To illustrate: If, for instance, it could be proven that Peter Hall had threatened to burn the barn of W. E. Rakes, or that he had threatened to kill Grover Beamer, or that he had attempted to assault the daughter or wife of some other of the five indicted men, such facts could, I think, be proved (but not by hearsay testimony) as
275 having a tendency to show a cause of hostility to Peter Hall on the part of the indicted persons other than the fact that Peter Hall had been reporting illicit distilleries.

By Mr. STAPLES:

We also further offer to prove by the witness that he himself was employed by a citizen of that vicinity to watch his, the said citizen's barn, and to look out for Peter Hall, who had made threats against said citizen.

By the COURT:

Is the citizen referred to any one of the indicted men?

By Mr. STAPLES:

He is a brother-in-law of one of the parties in the indictment.

The Government objects to the question.

The Court sustains the objection, for the reason that the evidence has too remote an application to fall within what the Court regards as the true rule.

To which ruling of the court the defendant by counsel then and there excepts.

276 MONROE SMITH by Judge HAIRSTON:

Q. Where do you live?

A. In Patrick County.

Q. Were you at a distillery on the lands of Aleck Rakes some time in the month of December last or January or along in the winter, with W. E. Rakes and Aleck Rakes?

A. I don't remember it if I was; no, sir; that is a mistake.

Q. Were you there with Aleck Rakes, at which time you and Aleck Rakes got a jug of whisky from W. E. Rakes?

A. No, sir.

Q. Do you remember of ever being at a distillery about a quarter of a mile from Aleck Rake's?

A. Yes, sir; some three or four years back.

Q. Who was operating the distillery at the time?

A. A fellow named Hall was there.

Cross-examination by Mr. MOORE:

Q. Was that at the same place that these officers cut up the still?

A. I suppose it was. I have not been in the hollow for two years. I heard there was a distillery cut up in the hollow above the barn.

Q. You have not been there for two years?

A. No, sir.

277 Q. Do you remember seeing Mr. W. E. Rakes getting a jug of liquor at any time you were there?

A. No, sir. I remember seeing W. E. Rakes at the distillery I think some 3 or 4 years when this other fellow was making it. My understanding was this man Hall was running the distillery.

Q. Did you really know whose it was?

A. No, sir.

Q. Was that a man by the name of Connor Hall?

A. No, sir; John Hall.

Q. Was that the one they called "Fool John?"

A. I could not say. If there is any Fool John that is the one, I reckon.

Q. That was in the same hollow where this still was cut up?

A. I suppose it was.

Q. But it was in the hollow there above Rakes's?

A. Yes.

Q. And about one-half mile from Aleck Rakes's?

A. I suppose so.

Q. And you do remember seeing old man Aleck Rakes in there but you don't remember about the jug of liquor?

A. I don't remember--I think I saw Will Rakes, in the hollow there.

Q. You have seen him at that distillery, haven't you?

A. I think so. I would not say positively about old man Aleck. It is not far from where I live.

Q. If I gather it correctly, you have been at the site of an illicit distillery about ½ mile from old man Aleck Rakes's in the hollow, and the best you can tell it is the same place where this distil-
278 lery was cut up; you have seen W. E. Rakes there; a "Fool John" Hall was running it while you were there, and you have got some liquor there yourself?

A. Yes, sir.

Q. But you can't remember whether old man Aleck Rakes got a jug, that is about the only thing you don't remember, is it not?

A. Yes, sir; I don't remember seeing him get the jug.

Q. You are related by marriage to Mr. W. E. Rakes are you not?

A Yes, sir; a little.

Redirect examination by Judge HAIRSTON:

Q. You say you have seen W. E. Rakes at a distillery being operated by John Hall. You have seen other people there, haven't you?

A. Yes, sir; I have seen some others there, a fellow named Hylton was up there visiting the distillery.

Q. Hylton left with old man Aleck Rakes didn't he?

A. Yes, sir.

Q. He left with old man Aleck?

A. Yes, sir.

Q. State to the jury whether or not you are positive that you never got any whisky there with old man Alex Rakes any time last winter?

A. I haven't been in the hollow, I am pretty well satisfied of that, I haven't been in the hollow at all.

Q. In three years?

A. Hardly that long, 2 or 3 years. I had a job that held me every day, and I was away from home all the time.

279 J. M. ROBERSON by Judge HAIRSTON:

Q. Where do you live?

A. In Patrick.

Q. What relation are you to W. A. Elgin, the minister.

A. I married his daughter.

Q. Where were you on the night of the fourth Sunday in March, 1907, or the evening of that day?

A. Evening or night?

Q. Evening and night.

A. I was at Mr. Elgin's; I went to Mr. Nowlin's at night.

Q. What Nowlin?

A. Charles Nowlin.

Q. Who did you see at Charles Nowlin's?

A. The whole time that I was there? The family of Mr. Nowlin, Charlie Turner——

Q. Charlie Turner lives there, don't he?

A. Yes; and Grover Beamer and my sister was there.
Q. What time did you get there?
A. Just about sundown.
Q. Who was with you?
A. My wife.
Q. How long did you remain there?
A. It was somewhere between 8 or 9 o'clock when I left there. I could not tell you just what time. It was a little after 8 o'clock by his clock, but he said that his clock probably was too slow. It could not have been past nine o'clock when I left there.
Q. Was Mr. C. P. Nowlin at home?
A. Yes; he came in after night.
Q. Do you know where he had been?
280 A. I do not.
Q. How long did Grover Beamer remain there after you got there?
A. Grover Beamer came in the house, I was in the porch, he came in, went on in the room, and that was the last I saw of him. I didn't see him any more; don't know where he went.
Q. He got there after you came, did he?
A. Yes.
Q. And he went on in the house, you all were in the porch?
A. I was there.
Q. Where were your wife and your sister?
A. In the house in the sitting room.
Q. That opens out on the porch?
A. Yes.
Q. Did you go back in there?
A. Yes.
Q. Was Grover Beamer in there then?
A. No.
Q. How long did you remain there after Grover Beamer came?
A. As I told you, what time I left——
Q. You didn't see him any more?
A. I didn't see him any more while I was there.
Q. You think it was about nine o'clock when you left there?
A. Between eight and nine. I rather think it was about eight thirty.
Q. Was Charlie Turner there when you left there?
281 A. He was right there in the room.
Q. Where were your horses tied?
A. I walked down there.
Q. When you left there between half-past eight and nine o'clock, Charlie Nowlin was there—you left him there?
A. He was there.

Cross-examination by Mr. MOORE:

Q. How far was that from where Miss Elizabeth Hall lives?
A. From Mr. Nowlin's? I don't know as I could tell you exactly. I would think 1½ or two miles.

Q. How far was it from where Miss Jane and Ann Hall lived?

A. To Mr. Nowlin's? About ¼ of a mile I would think, or one half; somewhere along there.

Q. What time of night was it when Mr. C. P. Nowlin came in the house?

A. I would think it was between ½ an hour or ¾ of an hour after dark.

Q. How long had you been there yourself?

A. I got there just about sundown.

Q. So it must have been an hour or more after you got there before he came.

A. Something near an hour.

Q. Which came in first, he or Grover Beamer?

A. Grover Beamer.

Q. Then Grover Beamer went on in the room and you didn't see him any more?

282 A. I didn't see him any more.

Q. Where did Mr. Nowlin go when he came?

A. He came in, stayed a little while and went out to feed—I think he and Charlie Turner. He asked Charlie Turner if he had fed the stock and went on out to feed.

Q. Do you know where Charlie Nowlin was when you left?

A. He was there.

Q. You didn't see Grover Beamer any more, and when you left you left Charlie Turner there, and that was between eight and nine o'clock, and you left Mr. Nowlin there?

A. Yes.

Q. That was the same time that you left Mr. Nowlin there, between eight and nine o'clock?

A. Yes.

Q. And Charlie Turner you say lives at that house?

A. Yes.

Q. Grover Beamer also a part of the time?

A. Well, he stayed there; I don't know whether he called it his home or not.

Q. Who was with Grover Beamer when he came in?

A. Nobody.

Q. Did Charlie Turner come in with him?

A. No. I think Charlie Turner was at the wood pile or picking up wood to carry in the house. Grover Beamer came in just a little while after I got there before dark.

Q. Do you know whether Charlie Turner was there when you got there?

283 A. Yes, I think Charlie Turner was there at the house. He was there at the house when I got there.

Q. Where did you get your supper that night?

A. At Mr. Nowlin's.

Q. Where was Mr. Nowlin when you were at supper?

A. He had not come in.

Q. Where was Grover Beamer when you were at supper?

A. I don't know; he never came in to supper.

Q. While you were at supper Grover Beamer and Mr. Nowlin were not at supper and you don't know where they were while you were at supper?

A. No.

Q. Where was Charlie Turner while you were at supper?

A. I don't know; he didn't eat supper with us.

Q. Mrs. Nowlin was at the supper table with you?

A. Yes.

Q. All the members of the family except Grover Beamer, Charlie Turner, and Mr. Nowlin?

A. Yes.

Q. So you all sat down except these three, and where they were while you were at supper you don't know?

A. I do not.

Q. Where they were after you left the house, between eight and nine o'clock, you don't know, do you?

A. No.

Redirect examination by Judge HAIRSTON:

Q. What time did you all have supper?

284 A. It was not but just a little after dark.

Q. Had Mr. C. P. Nowlin gotten home then?

A. If he had, he had not come in the room.

Q. How was Grover Beamer dressed that night—Sunday clothes, or how was he dressed?

A. I think he was fixed up right well; don't know whether he had on his usual Sunday suit or not. He was not overdressed in any way.

Q. You saw him at church that day, didn't you?

A. I don't remember seeing Grover at church.

Q. How large a boy is that boy Charles Turner, and how old do you think he is?

A. He is as large as me if not larger; I don't know what his age is. I would suppose that he was about seventeen or eighteen years old.

Q. You have been to Mr. Nowlin's right frequently, haven't you?

A. I have been to Mr. Nowlin's some few times.

Q. With your wife?

A. Yes; but that was the first time I had been there since I was married.

Q. It is not unusual for these working boys, Charlie Turner, to eat at the first table with the family, is it, Mr. Roberson?

A. I could not tell you about that.

Q. You had the table about full anyway, didn't you—several in the family?

A. Yes; as well as I remember the table was about full; I could not say it was at all.

Q. Does not it come within your knowledge that Mr. Nowlin had been off on a trip and had been gone all day?

285 By Mr. MOORE:

Don't tell what Mr. Nowlin told you.

A. I never heard.

By Mr. MOORE:

That is what I am objecting to.

Recross-examination by Mr. MOORE:

Q. You were asked if it is in your knowledge, and so on, that it is unusual for the working boys up there, like Charlie Turner and Grover Beamer, to eat with the rest of the company. Is it or not usual for Mr. C. P. Nowlin, the head of the family, to eat with the family?

A. I worked for Mr. Nowlin one day once. I never ate at his table but a time or two, excepting then, and Mr. Nowlin ate then.

Q. So he ate with you when you were working for him?

A. Yes.

Q And you were working for him in the same capacity as Charlie Turner. Did Grover Beamer and Charlie Turner eat with him?

A. Yes.

Q. So Charlie Turner, Grover Beamer, and you and Mr. Nowlin and the rest of the family ate together?

A. Grover was not there then.

Q. Leave him out then.

A. Yes.

Q. Mr. Nowlin made no distinction between you that he would not eat with you at the table, did he?

A. No.

286 3 Direct examination by Judge HAIRSTON:

Q. Mr. Nowlin did not eat with the family when he was not at home, did he?

A. Why, he could not do that.

Q. When it was announced that the meal was ready that evening he was not there, was he?

A. He was not in the room.

Q. Had you seen him anywhere on the premises?

A. I had not.

Q. Was it usual for young men who do work there on the farm for Mr. Nowlin to eat at the table when there was company enough to fill the table?

A. I don't know; I was not there enough to know.

Q. Well, is it usual—you always give the company the preference, don't you?

A. Well, it is the custom.

287 J. M. HOOKER (introduced by the Government) by Mr. MOORE:

What official position do you hold?

A. I am Commonwealth attorney of Patrick County.

Q. How soon after the murder of Miss Ann Hall was it that you were notified?

A. I was notified, I presume, abount nine o'clock in the morning, not sure as to the hour, but about that hour; I was notified by a phone message from Squire Dillon.

Q. Please state what you did and the condition of things you found at the place of the murder.

A. I got a doctor, Doctor Dickerson, and went to the scene of the killing. I phoned Squire J. H. Dillon to meet me there and to be prepared to hold an inquest when I reached there. It was a distance of some twenty-five miles from Stuart. I reached there about three o'clock in the afternoon; I found the dead body of Ann Hall lying in the door and things torn up around the house and shot holes through the door and beds turned over and scattered about and molasses turned over, on the floor, and everything in a general state of confusion.

Q. Where was the dead body lying?

A. It was in the door.

Q. What other evidences of shooting did you see besides those you have enumerated?

A. Some shells were given me that were picked up there.

Q. Please state whether these I show you appear to be the shells that were picked up there that day—that were given to you that day.

A. They do.

288 Q. How do you identify them?

A. By the initials marked upon them.

Q. What did you do with the shells?

A. I carried them back to my office at Stuart.

Q. State whether or not you delivered them onto the hands of the Federal authorities.

A. I did.

Q. So the coroner's inquest was held, was it?

A. Yes.

Q. What other legal proceedings did you conduct besides that?

A. We had a warrant to issue for the arrest of William E. Rakes.

Q. What was that warrant based upon?

A. Upon the testimony of Jane Hall and Joe Hall, given before the coroner's jury, and on that warrant W. E. Rakes was arrested the following day.

Q. State to the jury the finding of the coroner's inquest.

Counsel for the defendant objects on the ground that a record is the best evidence of that.

Question withdrawn.

Q. So a warrant was issued then for the arrest of W. E. Rakes. Did he testify in his own behalf?

A. He did.

Q. What did he say on that trial with reference to where he was the night of the murder?

A. He stated that he was at his home.

Q. Covering what period of time?

289 A. He first stated that he was at home all day and that he stayed at home that night, the night of the killing; to use his exact language, he first said that he did not go off of his premises that day.

Q. Did he say anything else?

A. Upon cross-examination I asked him if he did not pass or go by Turner Rakes' mill or Monroe Smith's mill, I don't remember which gentleman was the owner of the mill. He said that he did; my recollection is that he said he was going out to get some beer and did pass this mill that afternoon.

Q. He first stated he was not off of the premises, but on cross-examination stated he was down at Turner Rakes' mill?

A. I asked him the question, that he had been seen to pass the mill by Wise and Akers Nowlin, and I asked him the question and he stated he did pass it.

Q. Is that mill on his premises?

A. I think not. I am not familiar with the ownership of the property, but my understanding is that it does not belong to him.

Q. What did he say about who stayed at his house the night of the killing?

A. He said that just the family, nobody else, himself and his family.

Q. Please state whether or not he made that statement more than once in the progress of that trial.

A. I think that I had him to repeat that, that there was nobody else there that night, and he also stated that there was nobody else there that Sunday afternoon except the family; the killing was on Sunday night.

290 Cross-examination by Mr. STAPLES:

Q. Mr. Hooker, I show you a door which has been exhibited by the Government as being the door of the south side of the house. Standing the door with the outer side to the south, please tell us on which side it appears to have been hinged.

A. From this side it is——

Q. On the left side going out?

A. That house was sitting, as well as I remember, almost north and south itself.

Q. Then if it was on the west side, the door was hung on the south?

A. Well, I could not say, that would have been hanging on the north side.

Q. If this is the west side, this would be the south, would it not?

A. I should think that this would be hinged towards the north ends of the house.

Q. Looking at the inner side of the door, was it swung on the right or on the left edge?

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A. It would have been to the left edge.

Q. I ask you to state whether or not you saw signs of 1, 2, 3, or 4 pistol holes or buckshot.

A. I saw signs of some shots; I could not tell whether from a pistol or not.

Q. From slipping a pencil into the hole, does not it seem to have been made by a bullet very near as large as a pencil?

A. Yes.

291 Q. What is the direction of this bullet hole into the door from the inner side, is it the side towards the hinged side or the lock side of the door?

A. It is towards the hinged side.

Q. I show you something which appears to be a block or peg pulled out of the inner side of the door near its center about 16″ from the top. Will you state whether or not the hole that it comes out of looks like it might have been a pistol bullet hole?

A. I can not say as to that Mr. Staples.

Q. It is about the size of a "38" bullet, is it not?

A. I am not a very good authority on the size of bullets and caliber.

Q. Don't you know how much an inch is?

A. Yes.

Q. Is that more than ¼ of an inch wide?

A. No.

Q. By a little less than ¼″ peg?

A. Yes.

Q. And that is slanting into the door?

A. Yes.

Q. I will ask you, on the outer side where that comes through, if there does not appear to have been a splinter about 5″ long knocked out of the door?

A. It seems to have been. There is a very old looking scar.

Redirect examination by Mr. MOORE:

292 Q. Please compare the scar that you have referred to that was made supposedly by a pistol being fired from the inside of the door, with the scars that were made by the shots fired there that night.

A. The one you mention as being made by a bullet appears to be much older than those others.

By the COURT:

Gentlemen of the jury, I will ask you to make a thorough examination of the door, as it will be a subject of argument by counsel.

By Mr. STAPLES:

Q. Do you know how far it is from W. E. Rakes' house to Turner Rakes' mill?

A. I do not.

293 J. H. DILLON, by Mr. STAPLES:

If your honor please, we object to Mr. Dillon testifying.

By the COURT:

If the testimony of this witness will prejudice your case, I will not permit him to testify.

By Mr. STAPLES:

We can not say that it has misled us at all.

By Mr. MOORE:

Q. Please tell the jury whether you were the justice of the peace who held the preliminary examination of Wm. E. Rakes.

A. I was.

Q. State whether Mr. Hooker, the Commonwealth's attorney, was present.

A. He was there.

Q. Do you remember what W. E. Rakes stated with reference to where he was on the night of the murder and the day before the murder?

A. He first stated that he had remained at his home all day on Sunday before the murder.

Q. What else did he say?

A. Then he admitted that he did leave home in the evening to get some beer, I believe, and was near Turner Rakes' mill Sunday evening.

Q. Where did he say he was the night of the murder?

A. He said he was at home.

Q. Who else did he say was at his home besides himself?

A. He said there was no one else except his family.

294 Cross-examination by Judge HAIRSTON:

Q. How far is it from Turner Rakes' mill to Will Rakes' house?

A. I could not tell you exactly. It has been twelve years since I was there.

Q. Is it not very near his house?

A. I think it is something nearer than one-half mile.

Q. He told you he was near Turner Rakes' mill on Sunday before the killing?

A. Yes.

Q. He didn't tell you that he was at a blockade distillery?

A. He didn't say anything about a blockade distillery.

Q. But he did tell you positively that he was at home that night?

A. He did.

295 Dr. L. C. DICKERSON, by Mr. MOORE:

Q. You are a practicing physician?

A. Yes.

Q. Are you the physician whom Mr. Hooker called to attend this coroner's inquest?

A. I was.

Q. Please describe the position in which you found the body.

A. We got there in the afternoon. We found the dead body of the woman, Miss Hall, lying in the door, with the feet hanging out. I removed the clothing and examined her and found that she had been struck with twenty-eight shot, ranging from the shoulder to the hip, five of which took effect in the left breast. Probing after these five, I found that one entered the cavity in the region of the heart.

Q. Having found that one entered the cavity did you probe the others?

A. I tried the others but could not get the probe to enter. This one that the probe passed was about 3½ or 4″ below the collar bone, near the center of the chest, ranging downward and backward, possibly a little outward.

Q. Please state what in your opinion was the cause of her death.

A. I believe gunshot wounds were the cause of her death. I saw no other evidences.

Q. Did you find any evidence of a wound on Miss Jane Hall?

A. One little shot wound, supposed to be, near the elbow.

296 Q. What other evidences of shooting did you see about the house?

A. Shot holes through the door.

Q. How about the window?

A. The window was knocked out, shot out or something. All the panes were out.

Cross-examination by Judge HAIRSTON:

Q. Did you find any shot on the person of Ann Hall that you got out and examined?

A. I got out a couple of them.

Q. How far were they embedded?

A. I got them from the arm, where they could not go deep.

Q. What size shot were they?

A. Not larger than "4" or smaller than "6."

Q. From what part of the arm did you take them?

A. From between the wrist and the elbow.

Q. Have you the probe with you that you probed that wound with?

A. No.

Q. How many times or how many impressions did you undertake to probe?

A. I tried four or five.

Q. But the probe only entered one?

A. Yes.

297 Q. And that was in the region of the chest.

A. In the region of the heart.

Q. How large was that probe that you used?

A. About as large as a darning needle, a small probe.

Q. Is it not a fact that the wound that you probed was made by a larger shot than the shot you extracted?

A. I could not say as I did not see the shot.

Q. You stated you probed it.

A. I did.

Q. You testified before in this case, didn't you?

A. I did.

Q. Didn't you testify that the wound ranged downward and backward?

A. Yes.

Q. And that some of the holes looked larger than the others?

A. Yes; a glancing shot on a round surface would cut a larger hole than one right against it or straight into it.

Q. You were under the impression then that the party who fired the shot must have been in a higher position than the party who received the shot? If they ranged downward and backward?

A. Yes; it would seem so.

Q. Have you any doubt about that proposition?

A. Not a bit.

Q. That the party who fired that shot that killed her was in a higher position than she was?

A. Yes.

298 Q. What was the height of Miss Hall?

A. She looked like a woman of five feet five inches.

Q. Taller than her sister Jane, wasn't she?

A. I could not say, about five feet five, or five feet three, not a great deal over five feet.

Q. Would you think it possible for a party standing two feet lower than a woman who was five feet five inches high to have inflicted a shot that would have ranged downward on the woman?

A. Not if she was in an upright position.

Q. If she was standing or walking along the floor at the time she was shot it would have been impossible for that shot to range down?

A. If she was stooping forward it would have been bound to go upward, if the man that had the gun was two feet lower.

Redirect examination by Mr. MOORE:

Q. You say that those holes were of different sizes that you found?

A. Some places looked larger, owing to the surface.

Q. Were you enabled to tell from the examination of those wounds generally the position occupied by this lady when she was shot, whether she was erect, stooping or how?

A. No, sir; I could not.

Thereupon the Government rested its case.

The defendant next introduced W. T. Rakes.

299 W. T. RAKES by Judge HAIRSTON:

Q. Where do you live?

A. On Shooting Creek.

Q. What county?

A. Patrick.
Q. What kin are you to Mr. W. E. Rakes here on trial?
A. He is my uncle.
Q. What kin are you to Peach Rakes, who is also indicted?
A. We are said to be brothers.
Q. Are you the one that is known as Little Will Rakes?
A. I suppose so.
Q. Do you remember last March about the time that Ann Hall was killed?
A. Yes, sir.
Q. It is said that she was killed on Sunday, March the 24th?
A. Yes, sir.
Q. Where were you on that Sunday?
A. I was at home.
Q. Were you at home all day?
A. No, sir.
Q. Where did you go during the day?
A. I went to a distillery.
Q. How far was that distillery from you?
A. Three-fourths of a mile, I suppose; it was not very far.
Q. How long did you remain at that distillery?
A. I didn't stay but a little bit.
Q. Did you see anybody there?
A. Yes.
300 Q. Who did you see there?
A. There was several.
Q. Can you remember them all—did you see Wm. E. Rakes there?
A. I can't remember all of them.
Q. Did you see Wm. E. Rakes there?
A. Yes.
Q. Did you see Peach Rakes there?
A. Yes.
Q. Who else was there besides the two I have mentioned?
A. Jim Emberson, Peach, Will, Pete Martin, and George Martin; I remember that many. There was some others, several; I never paid much attention to them.
Q. Did you leave there with W. E. Rakes?
A. No.
Q. Who did you leave there with?
A. With Pete Martin.
Q. Where did you go after you left there?
A. I went home.
Q. What did you do after you got home?
A. I went down with Pete Martin and got a load of corn he had brought for me to the line—they would not allow me to cross the line.
Q. Do you mean the line of the county?
A. Yes.
Q. Where did Martin live?
A. In Franklin.

Q. Why was it they would not let you cross the line?
A. It was on account of cattle——
301 Q. How far was the county line from your house?
A. About 50 yards. I lived right on the line.
Q. What kind of grain was it?
A. Corn.
Q. After you got the corn where did you go?
A. I come on home with it.
Q. Up to that time and during that day, what was the state of your health? Had you been sick any length of time?
A. Yes, sir; I had neuralgia and grippe.
Q. Had you been sick any length of time?
A. About 2 weeks.
Q. Had you a doctor?
A. Yes.
Q. Had you been dangerously sick, or not?
A. The doctor said I was in a right bad fix.
Q. Did you have your head and throat bandaged up or not that Sunday?
A. I did; yes, sir.
Q. How much corn did you get?
A. Something like 12 bushels, maybe a little more or a little less.
Q. After you got your corn and brought it home, who loaded it for you?
A. Pete Martin loaded it for me.
Q. You are a married man, are you?
A. Yes, sir.
Q. After you got the corn home, what did you do?
A. I unyoked my cattle and turned them out and then laid down on the bed.
302 Q. How long did you remain at home?
A. All that evening and that night until next morning.
Q. Was that Sunday the first day you had been out, or not?
A. Yes, sir.
Q. Are you the man Jim Emberson went after the doctor for?
A. Yes.
Q. Were you at Elizabeth Hall's that Sunday night, or at Jane Hall's?
A. No.
Q. You stayed at home all night that night?
A. Yes.
Q. You know Mr. Aleck Rakes, do you not?
A. Yes, sir.
Q. He is your uncle, isn't he?
A. Yes.
Q. How far do you live from his house?
A. About 3 or 4 miles.
Q. When was the last time that you were there at his house?

A. I could not tell you. I don't remember that I was ever at his house in my life.

Cross-examination by Mr. MOORE:

Q. Are you a distiller yourself?

A. No, sir.

Q. What were you going to do with that load of corn?

A. To use it for bread and to feed my stock.

303 Q. You are a farmer, you said awhile ago?

A. No, sir; I don't think I did.

Q. Are you a farmer?

A. No, sir.

Q. What is your business?

A. I am a laborer.

Q. So you are not a farmer?

A. No, sir; not altogether, I farm some, and labor, just as I can get a job.

Q. What kind of jobs?

A. Anything that there is labor in that I can get that I think is worth my labor.

Q. Will you object to telling us what kind of labor you do?

A. No, sir.

Q. Well, let us have it.

A. I work in the coal fields some; work on the farm some and do ditching.

Q. Who was the last man you ditched for?

A. I haven't ditched any not for a year as I remember.

Q. How long has it been since you dug any coal?

A. Two years I suppose.

Q. So you haven't done any ditching in the last year and no coal digging in the last two years. What kind of work have you been doing in that time?

A. Farming some, and doing a little gardening.

Q. I asked you awhile ago if you were a farmer, and didn't you say "no"?

A. Well, I am not altogether.

304 Q. You say you have a small farm; how large is it?

A. 30 or 40 acres.

Q. If you don't farm your farm, who does it for you?

A. I farm it a little, most of the time I rent it out, except when I was in the coal fields.

Q. You haven't dug any ditches in a year?

A. No, sir.

Q. What have you been doing the last year or two?

A. Just anything that come along that I could get a job at.

Q. Can't you think of something that you have done in the last year or two; now, what have you done?

A. I have made a little crop and have been attending to that for a part of the time; I made a little garden and a little corn crop.

Q. You know Captain Gee, don't you?
A. Yes, sir; Captain Gee?
Q. Yes; a revenue officer.
A. No, sir; I don't know him.
Q. Didn't he catch you in an illicit distillery?
A. Captain Gee?
Q. Well, maybe it was some other fellow.
A. It was a fellow, Mr. Felts, caught me at a distillery several years ago, I think.
Q. Can't you now recall Captain Gee in some way?
A. No, sir; no, sir.
Q. Well, maybe that is another one that I am talking about. Mr. Felts caught you in a distillery?
A. Yes, he caught me at a distillery.
Q. It was not yours, I guess?
A. No, sir.
305 Q. Whose was it?
A. Nealus Thomas's.
Q. How long ago has that been?
A. Three or four years ago I suppose.
Q. That was Nealus Thomas's distillery. Now tell us the next one you were at after that.
A. That was Peach Rakes' and James Emberson's.
Q. So you were not at a distillery from the time Felts caught you until you were up there at the distillery last March?
A. No, sir; not that I remember of, not an illicit distillery.
Q. Your recollection is not good, is it?
A. No, sir.
Q. It may be we can remind you. Do you know where Mr. C. P. Nolen lives?
A. Yes, sir.
Q. You remember where he lives, do you?
A. Yes.
Q. Do you know where his land is?
A. No, sir; not altogether.
Q. Does he own several tracts of land?
A. I could not tell you that.
Q. He is related to you, isn't he?
A. Yes; some, I suppose.
Q. How many distillery sites have you seen on his land?
A. Don't know as I ever saw one in my life.
Q. How many are there on your land?
A. There is not any that I know of.
306 Q. How close is that distillery that you were at on Sunday to your house?
A. Something like a half mile.
Q. Whose land was that on?
A. I don't know; I think it was my brother's; it was said to be his or Emberson's.

Q. You don't know then who owns the land in ½ mile of you?
A. I suppose it was his or Emberson's one.
Q. How many other still sites on your brother's land?
A. I could not tell you of any more as I know of.
Q. What was your interest in that distillery?
A. Not any.
Q. You seemed to have great difficulty in remembering just when Miss Ann Hall was killed. Have you any trouble in remembering that, really?
A. It was in March, the last of March the best I remember, the fourth Sunday I think.
Q. How long after that thing happened was it before you heard of it?
A. It was on Monday evening.
Q. Who told you?
A. Jeff Snead's wife told my wife and she told me.
Q. How long was Will Rakes, George Martin, and George Booth at that distillery that day?
A. I could not tell you. I stayed there about a half hour, maybe longer. I left them there.
Q. You say you are not a farmer; how much corn did you have on your 30-acre farm this last year?
A. I didn't make any crop much, I suppose I made seven or eight bushels.
307 Q. How much wheat?
A. Not any.
Q. How much tobacco?
A. Not any. It was a farm I just bought and I hadn't got it in any shape.
Q. Can you tell us anybody that you worked for in this last year?
A. I worked for old man Jeff Snead.
Q. How long did you work for him?
A. I don't remember, a day or such a matter.
Q. Tell us somebody else you worked for?
A. For old man Wid Rakes a day or such a matter. I think it was a half day.
Q. Give us somebody else?
A. That is all I remember of.
Q. That is during the last year, is it?
A. Yes.
Q. You haven't dug any ditches you say, for a year?
A. No, sir.
Q. And you haven't dug any coal for two years?
A. No, sir.
Q. You haven't run your farm any this last year?
A. No, sir.
Q. So then in the last year or two years you have done one day and a half work; what have you been doing the rest of the time?
A. Attending to my farm and trying to clean it up.

Q. I thought you were not a farmer?
A. I try to attend to it when I can.
Q. Have you lived a whole year on seven bushels of corn? You have only done 1½ days work, that is the only work you have
308 done in the last year; how have you been living during all that time?
A. I had some money, and have not been able to work much of the time.
Q. Where did you get your money?
A. I made it in the coal fields.
Q. How much did you make?
A. $200 or $300.
Q. Did you buy your land with that?
A. With some of it.
Q. How long did you stay in the coal fields?
A. 2 or 3 years.
Q. So you have not been doing much since you came back?
A. I was trying to get my farm in shape.
Q. Have you cleared any land?
A. Yes, 8 or 10 acres.
Q. If you were not cultivating that land, why were you clearing it?
A. I just fixed it up.
Q. You have not cultivated it?
A. No, sir; not yet, not all of it.
Q. What relation are you to Peach?
A. We are said to be brothers.
Q. Peach Rakes is one of the men indicted here, isn't he?
A. I suppose so.
Q. Have you any doubt about it?
A. Why I reckon not.

Redirect examination by Judge HAIRSTON:

Q. How much land did you buy, did you buy your land
309 all in the woods?
A. Yes. There was not over 6 acres cleared.
Q. What did you pay for the 40 acres of land that you bought?
A. I paid $200.00.

Mrs. W. T. Rakes by Judge HAIRSTON:

Q. You are the wife of W. T. Rakes, are you?
A. Yes, sir.
Q. Is he or not known as Little Will Rakes?
A. Yes, sir.
Q. Mrs. Rakes, when did you first hear of the death of Ann Hall?
A. Monday evening between sundown and dark.
Q. Who told you about it?
A. Mrs. Snead.
Q. Where did Mrs. Snead get the information from?
A. Mr. Turner Rakes's store, so she said.

Q. Where was Will Rakes on Sunday night, the 4th Sunday night in March, the night they say Miss Hall was killed?

A. He was at home and was sick.

Q. Had he been anywhere that day?

A. He went up to a shack, I believe they call it, with Pete Martin, and got him a drink of beer, he said.

Q. When he came back with Pete Martin, what did he do?

A. He went down below the house about half a mile to get some corn.

310 Q. Where did you say he stayed on Sunday night?

A. He stayed at home.

Q. Are you positive of that?

A. Yes, he was not able to get anywhere.

Q. How long had he been sick?

A. Something near two weeks, but he hadn't been bed-fast not eight or ten days.

Cross-examination by Mr. MOORE:

Q. Do you object to telling us what you maiden name was?

A. No, sir.

Q. What was it?

A. Elizabeth Nowlin.

Q. Whose daughter?

A. Jim Nowlin's.

Q. Where were you raised?

A. In Patrick.

Q. How far from Charles Nowlin's?

A. We just lived sometimes in a half mile and sometimes a mile, generally their home was two miles away.

Q. What relation are you to Mr. Chas. P. Nolen.

A. He is my father's brother.

Q. So you are the niece then of Mr. Chas. P. Nolen?

A. This Charles P. here?

Q. Yes.

A. No, sir; I am thinking about another Chas. P. Nolen.

Q. Is there another Chas. P. Nolen in that country?

A. Yes, my uncle, he is a little relation to this Chas. P. Nolen, but I don't know how it is.

311 Q. What relation are you to W. E. Rakes?

A. I don't know.

Q. How long have you been living where you are living now?

A. 5 years. We have not lived there all the time. We stayed in the coal fields a couple of years.

Q. Which coal fields?

A. West Virginia—Hempstead, I believe they call it.

Q. Who owns the land you live on now?

A. We own it.

Q. From whom did he buy it?

A. From Mr. Snead.

Q. How many acres in it?

A. I don't know.
Q. How much did he give for it?
A. I don't know.
Q. Suppose I suggest $50 or $100—would that help you?
A. I have no idea.
Q. What is your husband's business?
A. First one thing and then another, in the coal fields some, and anywhere he can get a job.
Q. How long since he worked in the coal fields?
A. Something like 12 months.
Q. Hasn't it been two years or more?
A. Maybe over a year, but not that long.
Q. Did he bring any money back from the coal fields?
A. A little.
Q. Fifty dollars?
A. Maybe that, maybe more.
Q. $100.
A. I don't know.
312 Q. Do you know of any other work he did except working in the coal fields?
A. Yes, sir; he hires about to people.
Q. Can you name any of them that he worked for?
A. Yes.
Q. Give me their names, please?
A. He has worked for Mr. George Martin some, and Mr. Jim Lewis Martin.
Q. Any others?
A. I don't remember.
Q. How many years has it been since he worked for George Martin?
A. He worked some for him this summer.
Q. How long has it been since he worked for Jim Lewis?
A. He worked some for him this summer.
Q. What kind of work did he do for George Martin?
A. He helped him raise his house.
Q. Was that a still house?
A. No, sir; it was not.
Q. What kind of work did he do for Jim Lewis Martin?
A. He hoed corn.
Q. Have you any idea how many days he worked for George Martin?
A. No, sir.
Q. As many as two or three?
A. I don't recollect.
Q. How long did he work for Jim Lewis Martin?
A. I don't know how many days.
Q. Two or three days or a week for him?
A. No, sir; he didn't work a week.
313 Q. Did he work as much as a week for George Martin?
A. No, sir; just a day, and then he would work around home.

Q. You can not name any others except George Martin and Jim Lewis Martin?

A. I don't recollect exactly. I suppose there are some more.

Q. Did he dig any ditches there that you remember of?

A. I don't know whether he did or not.

Q. Who runs your farm?

A. We have no farm much; we run it ourselves, what little there is.

Q. What kind of crops did your husband have there last summer?

A. A little corn; grass.

Q. How much corn?

A. We never made but mighty little, 5 or 10 bushels.

Q. Where is the last still house your husband run?

A. He didn't run none.

Q. What did your husband do with that load of corn he got the day Miss Ann Hall was killed?

A. He got it to feed with and use.

Q. How many bushels in that lot?

A. I could not tell you.

Q. And he has a part of that yet?

A. Yes.

Q. How much has he now?

A. He took it to Emberson's mill. I could not tell you.

Q. So he has a part of that load of corn yet?

A. Yes.

314 Q. Has he bought any other corn in the meantime?

A. No, sir; I don't think he has; if he did, it is unbeknownst to me.

Q. What Emberson's mill was it he took this corn to?

A. Mr. Jim Emberson or Mr. Will Emberson—they are partners.

Q. You say he has a part of it yet?

A. Yes.

Q. Is that the last he bought?

A. That is the last corn I recollect of his buying.

Q. If there was 12 bushels—you say he has part of it yet?

A. Yes, sir; he has some of it there yet.

Q. That is the last corn he has bought?

A. That is the last I know of.

Q. And he took that to Jim Emberson's mill?

A. Yes.

Q. Jim Emberson and Peach Rakes were running a distillery right there close to you?

A. I don't know about that.

Q. Don't you know about that still there?

A. No.

Q. You don't know where that was?

A. No.

Q. Give us some idea about how much corn your husband raised this year on his farm.

A. No, sir; I can't give you any idea.

Q. How much did he raise last year?
A. I don't now that, either. He sees to the corn.
Q. Did you raise enough to do you last year?
A. No.
315 Q. Raise any wheat last year?
A. No, sir.
Q. How has your husband been making his living for the last year or two?
A. By trading, and working about from place to place.
Q. Trading in what?
A. Stock, cattle. He can make his living in other ways; you might think he makes his living by stilling, but he don't.
Q. How many head of stock has he bought in the last year?
A. He has not bought but one yoke of cattle.
Q. Does he own that yet?
A. Yes, sir; and some hogs.
Q. How many hogs has he bought?
A. Two.
Q. Has he got them yet?
A. He sold one of them; he has one yet.
Q. So, then, his extent of trading is that he bought a yoke of cattle that he has yet, and he has bought two hogs and sold one of them. What other trading has he done?
A. Well, he doesn't altogether trade.

By Mr. STAPLES:

If you honor please, do you not think this has gone far enough?

By Mr. MOORE:

Well, we are ready to stop right now, if any objection is made.
And thereupon the defendant rests his case.
Whereupon the Government also rests its case.

316 By Mr. STAPLES:

We desire to move in arrest of judgment, upon the ground:
1. That the court should not have proceeded to try the defendant or given judgment upon special plea;
2. That the verdict is not responsive to the issue;
3. That the verdict is bad for duplicity;
4. That there was no issue joined.

We further desire to move the court to set aside the verdict and grant a new trial upon the same grounds, and in addition upon the grounds that the court erred in overruling the motion to exclude all of the evidence from the jury; that the court erred in refusing the instructions asked for by the defendant and in giving the instructions given by the court. Also, that the court erred in the exclusion of proper evidence and in the admission of improper evidence, and further, upon the ground that the verdict is contrary to the law and the evidence, and is not supported by the evidence and is against the weight of the evidence.

And the court takes the motion under advisement.

317 And the court certifies that this is all of the evidence adduced upon said hearing.

Wherefore, inasmuch as the matters herein set forth do not otherwise appear of record in this cause, the defendant tenders this, his bill of exceptions No. 2, and prays that the same may be signed and sealed, and all and several the points therein set up be saved to him, which is accordingly done this 9th day of December, 1907.

HENRY C. MCDOWELL [SEAL],
District Judge.

318 *Defendant's bill of exceptions No. 3.*

Filed December 9, 1907.

In the District Court of the United States for the Western District of Virginia.

THE UNITED STATES
v.
WILLIAM E. RAKES.

Defendant's bill of exceptions No. 3.

Be it known that upon the trial of this cause and at the conclusion of all the evidence adduced, the defendant, by counsel, moved the court to exclude all the evidence from the jury, and direct a verdict for the defendant upon the same grounds stated in the similar motion made at the conclusion of the Government's testimony, and set forth in the defendant's bill of exceptions No. 2, which motion the court overruled, to which action of the court the defendant by counsel then and there excepted.

Also, that during the progress of the trial of this cause a witness, Peter Hall, was asked the following question:

Q. How many illicit distilleries have you seen there on the lands of William E. Rakes and C. P. Nolin and Robert E. Lee during the last five years? To which question the defendant then and there objected, which objection the court overruled; to which action of the court the defendant, by counsel, then and there excepted, whereupon the witness answered as follows:

A. I don't remember that I have seen any on William E. Rakes' land. As to C. P. Nolin's, I don't reckon there is a branch on his land anywhere that a distillery could be put up, but that there has been one.

319 Whereupon the following transpired:

Q. How much land does Mr. Nolin own in there. How many different tracts and how many acres?

A. He owns two tracts; I don't know how many acres. A good large boundary, one of the tracts.

Q. Give some of the places where the still sites are.

To which question the defendant, by counsel, objected, which objection the court overruled; to which action of the court the defend-

ant, by counsel, then and there excepted, and the witness answered as follows:

A. There was one down below his house about a quarter of a mile on the river. Not exactly below his house.

Also that the witness Alexander Rakes was asked by the district attorney the following question:

Q. Have you been threatened by anyone interested in this prosecution since you came here:

A. No; not particularly.

Q. How about Bill Turner, the father of Charlie Turner?

To which the defendant objected, which objection the court overruled, and allowed the witness to answer as follows:

A. He met me on the street and took me——

Here the witness was interrupted by the following question from the district attorney:

Q. So he met you on the street. What did he say to you?

A. He said that I had better be careful, that if one side did not get me the other would.

320 To which action of the court the defendant, by counsel, excepted.

Also that the district attorney asked of the same witness the following question:

Q. Did you or not have any conversation with William E. Rakes after you had got your dram and after the still had been cut up by the officer?

To which question the defendant objected on the ground that the time and place should be stated, which objection the court overruled, and permitted the witness to answer the question, to which action the defendant, by counsel, then and there excepted.

Wherefore inasmuch as the matters herein set forth do not otherwise appear of record in this cause, the defendant tenders this his bill of exception No. 3, and prays that the same may be signed and sealed and all and several the points therein set up be saved to him, which is accordingly done this 9th day of December, 1907.

HENRY C. MCDOWELL [SEAL],
District Judge.

321 *Defendant's bill of exceptions No. 4.*

Filed December 9, 1907.

In the District Court of the United States for the Western District of Virginia.

THE UNITED STATES
v.
WILLIAM E. RAKES.

Defendant's bill of exceptions No. 4.

Be it known that upon the trial of this cause, while the witness Ben Hall was on the stand and in the connection as appearing upon

page 193 of the evidence included in defendant's bill of exceptions No. 2, hereby referred to, the Government offered in evidence a certain gun, which was claimed to have been the gun of Grover Beamer, to the admission of which gun in evidence, the defendant, by counsel, objected on the ground that the same had not been identified, which objection the court overruled and admitting the gun in evidence, to which action of the court the defendant, by counsel, then and there, excepted.

Wherefore inasmuch as the matters herein set forth do not otherwise appear of record in this cause, the defendant tenders this his bill of exceptions No. 4, and prays that the same may be signed and sealed and all and several the points therein set up be saved to him, which is accordingly done this 9th day of December, 1907.

HENRY C. MCDOWELL [SEAL],
District Judge.

322 *Defendant's bill of exceptions No. 5.*

Filed December 9, 1907.

In the District Court of the United States for the Western District of Virginia.

THE UNITED STATES
v.
WILLIAM E. RAKES.

Defendant's bill of exceptions No. 5.

Be it known that upon the trial of this cause, and in order to maintain the issue joined upon his part, the defendant offered as a witness his wife, to whose competency the Government objected, which objection the court sustained, and declined to permit the wife of the defendant to testify, after the statement of counsel for the defendant, that by her he expected to prove his whereabouts on the night of the alleged murder, to which action of the court the defendant by counsel then and there excepted.

Also that the defendant offered as a witness J. J. Brammer and divers other witnesses, to whom counsel for the defendant stated to the court that he proposed to propound the following question:

Q. Are you acquainted with the general reputation of Peter Hall in the community in which he lives, as to his being a desirable citizen, in response to which the witness will say that said Peter Hall was a notorious and offensive character in the community; that he was a general trespasser and petit thief, as well as a reckless character; that the better people in the community were afraid to leave their homes unprotected because of his dangerous character; and that the said Peter Hall had made threats against parties other than the defend-

ants charged in this indictment that he would destroy their
323 property, and that such parties took precaution to prevent such destruction.

Also, that the said witness was employed by a brother-in-law of the defendant, who resided in that vicinity, to watch his barn and to look out for Peter Hall, who had made threats against him, but the court, upon the objection of the Government, declined to allow the witness to be asked the said question, and declined to allow the defendant to prove any of said facts by this or any other witness, to which action of the court the defendant, by counsel, then and there excepted.

Wherefore, inasmuch as the matters herein set forth do not otherwise appear of record in this cause, the defendant tenders this his bill of exception No. 5 and prays that the same may be signed and sealed, and all and several the points therein set up be saved to him, which is accordingly done this 9th day of December, 1907.

HENRY C. MCDOWELL, [SEAL.]
District Judge.

324 *Defendant's bill of exceptions No. 6.*

Filed December 9, 1907.

In the District Court of the United States for the Western District of Virginia.

THE UNITED STATES
v.
WILLIAM E. RAKES.

Defendant's bill of exceptions No. 6.

Be it known that upon the trial of this cause after the jury had returned into court with their verdict, the defendant by counsel moved the court in arrest of judgment upon the following grounds:

1st. That the court should not have proceeded to try the defendant, or have entered judgment for the Government upon the special plea.

2nd. That the verdict is not responsive to the issue.

3rd. That the verdict is bad for duplicity.

4th. That there was no proper issue joined.

Which motion the court overruled, and to which action of the court, the defendant by counsel then and there excepted.

Whereupon the defendant by counsel moved the court to set aside the verdict, and to grant a new trial upon the same grounds, and upon the further ground that the court erred in overruling the motion of the defendant to exclude all the evidence from the jury; that the court erred in refusing the instructions asked for by the defendant, and in

giving the instructions given by the court; that the court
325 erred in the exclusion of proper evidence, and the admission of improper evidence, that the verdict is contrary to the law and the evidence, is not supported by the evidence, and is against the weight of the evidence. Which motion the court overruled, to which action of the court the defendant by counsel then and there excepted.

Wherefore, inasmuch as the matters herein set forth do not otherwise appear of record in this cause, the defendant tenders this his bill of exceptions No. 6, and prays that the same may be signed and sealed, and all and several the points therein set up be saved to him, which is accordingly done this 9th day of December, 1907.

HENRY C. McDOWELL [SEAL],
District Judge.

326 *Defendant's bill of exceptions No. 7.*

Filed December 9, 1907.

In the District Court of the United States for the Western District of Virginia.

THE UNITED STATES
v.
WILLIAM E. RAKES.

Defendant's bill of exceptions No. 7.

Be it known that upon the trial of this cause the defendant asked the court to give to the jury the following instructions:

Instruction No. 1.

The court instructs the jury that the accused is presumed by law to be innocent until his guilt is established by the evidence beyond a reasonable doubt, and if the jury entertain a reasonable doubt of his guilt upon the whole case, or upon any material fact necessary to the establishment of his guilt, such doubt is decisive, and the jury should find the accused not guilty.

Instruction No. 2.

The court instructs the jury that before they can find the defendant guilty they must believe beyond all reasonable doubt—

1st. That there was a conspiracy formed by the defendant and some other person or persons to threaten, kill, or intimidate Peter Hall; and

2nd. That such conspiracy was formed because the said Peter Hall was an informer of violations of the internal-revenue law.

Therefore, if the jury have any reasonable doubt of the motive actuating such conspirators, or are reasonably doubtful that such

motive operated to induce such conspiracy, they must find the defendant not guilty.

Instruction No. 3.

327 The court instructs the jury that the law presumes the defendant to be innocent; that such presumption follows through the whole course of the trial; that the evidence must show the guilt of the defendant to the exclusion of every reasonable hypothesis of innocence consistent with the evidence.

Therefore, in ascertaining the motive which actuated the alleged conspirators, you must attribute to them any motive consistent with their innocence, which can be reasonably reconciled with all the evidence.

But if you find beyond reasonable doubt that the intent was that charged in the indictment, you may find the defendant guilty of conspiring with said intent, although another or other reasons for conspiring may also have actuated some or all of the persons indicted.

Instruction No. 4.

The court instructs the jury that there must be sufficient evidence to show beyond all reasonable doubt that the defendant, with one or more parties to the said conspiracy, agreed between themselves to kill, injure, or intimidate Peter Hall, and that they were actuated by knowledge or belief that said Peter Hall was an informer.

Therefore, if the jury entertain any reasonable doubt of such motive, or believe that it is reasonable to suppose that such conspirators were actuated by some other motive, they must find the defendant not guilty.

Instruction No. 5.

In ascertaining the motive which actuated the said alleged conspirators, the jury should take into consideration all the relations between the said Peter Hall and all or any of the alleged conspirators shown by the evidence.

328 *Instruction No. 6.*

The court instructs the jury that the defendant is here on trial for a conspiracy alone, and an offense done pursuant to such conspiracy is to be considered only in connection with the punishment to be inflicted.

A conviction in this case operates as no bar to a prosecution of this defendant in the State court for murder.

Instruction No. 7.

The court instructs the jury that the motive and purpose of a conspiracy is the common motive understood by each party to the conspiracy to be the purpose of the other.

Therefore, although the jury may believe from the evidence, beyond all reasonable doubt, that two or more persons (not including the defendant) had conspired to kill, injure, or intimidate Peter Hall for reasons not connected with his alleged acts as an informer, and that while they were on their way to accomplish such purpose they encountered Grover Beamer, who joined them because he knew or thought Peter Hall to be an informer of violations of the revenue law; still you must further believe that the conspirators whom he encountered or some one or more of them were actuated (wholly or mainly) by the said last mentioned motive; or that the motive of the said Beamer was clearly made known to and acquiesced in by them (or some one of them) before you can find the defendant guilty.

Instruction No. 8.

The court instructs the jury that unless they shall believe from the evidence beyond a reasonable doubt that the killing of the deceased was the ordinary and probable effect of the alleged wrongful act specifically agreed on between the accused and his alleged con-
329 federates, and not a fresh and independent product of the mind of one of the confederates, outside of and foreign to the common design, the accused can not be held responsible for the killing.

Instruction No. 9.

The court instructs the jury that although they may believe from the evidence that shortly prior to the fatal shooting the accused met four other men, who stated that they were going to the house of the deceased to find one Peter Hall, who they said was an informer, to run him out of the country, and that the accused joined them and accompanied them to said house to assist in said purpose; still if the jury further believe from the evidence that upon reaching the said house, the said Peter Hall was not found there, and that some one or more of the party other than the accused (without any encouragement from the accused) fired a number of shots, one of which killed the deceased, the accused can not be held guilty of that offense. In other words, the accused may have unlawfully conspired with others with respect to Peter Hall, and yet that fact be wholly insufficient to render him liable for the perpetration by one of his co-conspirators of a wholly different offense against some other person, and wholly beyond the contemplation of the accused.

Instruction No. 10.

The court instructs the jury that under the laws of Virginia, murder in the second degree is punishable by confinement in the penitentiary for not less than five nor more than eighteen years. Voluntary manslaughter, by confinement in the penitentiary for not less than one nor more than five years. Involuntary manslaughter, by

confinement in jail not more than one year or by fine not exceeding $500 nor less than $5, or both.

330 That if you find that the defendant is guilty of the conspiracy as charged in the indictment, and also guilty of either of the foregoing offenses, it is for the jury to determine the punishment for such offense within the limits above set out.

Instruction No. 11.

The court instructs the jury that the voluntary killing of a human being resulting from the commission of a crime not a felony is voluntary manslaughter.

Therefore, although you may find the defendant guilty of the conspiracy as charged in the indictment, and may further find that it was the common purpose of the conspirators to shoot at, alarm, and intimidate Peter Hall, without intent to kill him, and that the shot which killed Ann Hall was fired by one of the conspirators, but without intent to kill or injure any person, you can only find the defendant guilty of voluntary manslaughter.

Instruction No. 12.

The court instructs the jury that involuntary manslaughter is the unintentional killing of a human being resulting from an act unlawful but not felonious; that the conspiracy charged in the indictment is of itself a misdemeanor and not a felony.

Therefore, although you may believe from the evidence, beyond all reasonable doubt, that the defendant is guilty of the conspiracy to threaten or intimidate Peter Hall, as charged in the indictment; and may further believe, beyond all reasonable doubt, that Ann Hall was shot by one or more of the conspirators; and that it was

331 a part of the conspiracy and plot to shoot at, alarm, and intimidate Peter Hall; still, unless you believe beyond all reasonable doubt that it was the common purpose of the conspirators to kill Peter Hall, or to seriously injure him, or that the said shooting was intended to result in death or bodily injury to Peter Hall, you can not find the defendant guilty of more than involuntary manslaughter.

Instruction No. 13.

The court instructs the jury that if they believe from the evidence that the shooting done at the house of Ann Hall was pursuant to a plan participated in by the defendant to alarm and intimidate, but not to kill or injure Peter Hall, and that such shooting was not intended to kill or injure Peter Hall, they can not find the defendant guilty of any offense under the State law but only of the conspiracy.

Instruction No. 14.

That the motive and purpose of a conspiracy is the common motive understood by each to be the purpose of the other.

Therefore, unless you believe beyond all reasonable doubt that the defendant and some one other person entertained and were actuated by the knowledge or belief that Peter Hall was an informer, the conspiracy is not proven, and you must find the defendant not guilty.

Instruction No. 15.

The court instructs the jury that the Federal court has no jurisdiction to try, or punish for, the murder charged in the indictment, unless the same was committed pursuant to the conspiracy as charged; that the conspiracy alone gives jurisdiction to this court.

Therefore, unless you find from the evidence that every essential element of the conspiracy is proven by clear, distinct, and reli-
332 able evidence, and beyond all reasonable doubt, you have no power to punish for the murder as charged, but must find the defendant not guilty.

Instruction No. 16.

That where it has been clearly proven to the satisfaction of the jury that a witness is not to be believed on oath, no statement of such witness, standing alone and of itself, is sufficient to prove any material fact beyond a reasonable doubt.

Instruction No. 17.

If the jury believe from the evidence that the alleged conspirators only intended to intimidate, scare, or alarm Peter Hall because he was an informer, and not to kill or cause him serious bodily harm, there is no offense under the State law.

All of which instructions were refused by the court, to which action of the court, the defendant, by counsel, then and there excepted.

The court certified that in lieu of the instructions asked for by the defendant, the court gave to the jury the following instructions:

UNITED STATES
v. Indictment 1844.
WM. E. RAKES.

Court's instructions.

Gentlemen of the jury: (1) The Federal statutes under which the indictment here is drawn are, so far as is now material, as follows:

Sec. 5508, Rev. Stats.: If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Con-
333 stitution or laws of the United States, or because of his having so exercised the same; * * * they shall be fined not more than $5,000, and imprisoned not more than ten years, and shall be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

Sec. 5509, Rev. Stats.: If in the act of violating * * * the preceding section any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed.

The construction of these statutes is as follows: (a) The right or privilege of informing Federal revenue officers of violations of the Federal revenue laws, such as operating a distillery which has not been registered and for the operation of which bond has not been given, is "a right or privilege secured by the Constitution or laws of the United States;" (b) the first of the above sections is intended to prevent and forbid not only the mere forming of such conspiracies as are there described, but also is intended and designed to prevent and forbid those physical acts of violence and outrage such as would usually result from the formation of such conspiracies. Therefore the second section means that if a felony or misdemeanor be committed by persons who have conspired with the intent stated in the first section in pursuance of, or in carrying into effect the purpose of such conspiracy, the punishment for the offense under the State law shall be in this case governed by the law of Virginia.

(2) A conspiracy, so far as we are now concerned, is an agreement—which may be expressed or implied—to do an unlawful act.

(3) The court instructs the jury that the accused is presumed
334 by law to be innocent until his guilt is established by the evidence beyond a reasonable doubt, and if the jury entertain a reasonable doubt of his guilt upon the whole case, or upon any material fact necessary to the establishment of his guilt, such doubt is decisive and the jury should find the accused not guilty.

(4) In considering this case, the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be a reasonable doubt and it must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such that were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is not sufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say that you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

The credibility of the witnesses is a question exclusively for the jury, and the law is that where a number of witnesses testify, directly opposed to each other, the jury is not bound to regard the weight of evidence as equally balanced. The jury have the right to determine from the appearance of the witnesses on the stand their manner of testifying and their apparent fairness and candor, their character, their apparent intelligence or lack of intelligence, their opportunities for knowing the facts testified to, and from all the other surrounding circumstances bearing on the trial, which witnesses are more worthy of credit, and will give credit accordingly.

In determining the weight to be given to the evidence of different witnesses in this case, the jury are authorized to consider the relationship of the witnesses to the parties, if the same is proved; their interest, if any, in the result of this case; their temper, feeling
335 or bias, if any has been shown; their demeanor while testifying, and their apparent intelligence and other means of information, and to give such credit to the evidence of such witnesses as under all the circumstances the witnesses seem to be entitled to.

(5) Before you can find the defendant guilty of conspiring as charged you must believe beyond all reasonable doubt that there was a conspiracy formed by the defendant and some one or more of the other persons named in the indictment to injure, oppress, threaten, or intimidate Peter Hall because he had exercised the right of giving information of violations of the Federal internal-revenue laws. If you have a reasonable doubt as to the reason for the formation of the conspiracy charged in the indictment, you should acquit the defendant. However, the mere fact that some of the alleged conspirators may have been actuated by some motive not connected with "informing" by Peter Hall, is not ground for acquittal, if you believe beyond a reasonable doubt that at least one of such other alleged conspirators and the defendant conspired to injure or intimidate said Hall, mainly and chiefly because said Hall had exercised his rights as an "informer."

(6) It follows that, if you believe beyond all reasonable doubt that the defendant conspired with one or more of the persons indicted with the defendant to injure, oppress, threaten, or intimidate Peter Hall in the free exercise and enjoyment of the right to act as an informer of offenses against the Federal revenue laws, or because of his having exercised said right, you should find said defendant guilty of conspiring under section 5508, U. S. Rev. Stats., although you may believe him not to have been proven guilty of the commission of any other felony or misdemeanor. And in such event your verdict as to the conspiracy charge will not deal with the question of punishment.

(7) If, under and in accordance with the foregoing instructions, you find the defendant guilty of conspiring as charged,
336 you must then consider and determine whether or not he is guilty of any other felony or misdemeanor committed in attempting to effectuate, or in pursuance of the purpose of said conspiracy. In considering and determining said question you should be guided by the following principles and rules of law:

(8) A willful, deliberate, and premeditated killing of a human being is murder in the first degree on the part of him who himself does such killing, and under certain circumstances (to be hereinafter set out) a defendant who did not himself do such killing may be responsible for, and may properly be held guilty of murder in the first degree, because of such killing by another person.

(9) Any killing of a human being with malice aforethought, but which is not willful, deliberate, and premeditated, is murder in the second degree on the part of the person doing such killing. And

under the circumstances to be hereinafter set out, a defendant who did not himself do such killing may be properly found guilty of murder in the second degree because of such killing by another person.

(10) If you shall have found defendant guilty beyond all reasonable doubt of the conspiracy as charged, and if the killing of Ann Hall was done, beyond such doubt, by the defendant or by a coconspirator of defendant's, and if it was (beyond such doubt) the result of a willful, deliberate, and premeditated intent on the part of the defendant or of a coconspirator to kill Peter Hall, and if such killing of Ann Hall was a natural and probable result of the common purpose of the conspirators, or of an attempt participated in by the defendant to execute such purpose, the defendant should be found guilty of murder in the first degree.

In such event you will not by your verdict deal with the punishment, which is fixed by law.

(11) If you shall have found beyond all reasonable doubt
337 that defendant conspired as charged and that the killing of Ann Hall was done by the defendant or by a coconspirator, and that, while not willful, deliberate, and premeditated, it was done with malice aforethought, and that it was a natural and probable result of the common purpose of the conspirators, or a natural and probable result of an attempt participated in by the defendant to execute the purpose of such conspiracy, the defendant should be found guilty of murder in the second degree. The malice necessary to make a homicide murder in the second degree may properly be inferred from the circumstances of the killing.

In the event you should find the defendant guilty of murder in the second degree, you will by your verdict also fix the punishment for said offense under the State law, which shall be imprisonment in the penitentiary for not less than five not more than eighteen years.

(12) If you do not find the defendant guilty of either murder in the first degree or murder in the second degree you should acquit him in so far as he is charged with an offense under the State law.

(13) If you find the defendant not guilty of conspiring as charged, your verdict will be:

"We, the jury, find the within named W. E. Rakes not guilty."

(14) If you find the defendant guilty of conspiring as charged but not guilty of any other offense, your verdict will be:

"We, the jury, find the within named W. E. Rakes guilty of conspiring as charged, but not guilty of any other offense."

(15) If you find the defendant guilty of conspiring as charged and also guilty of murder in the first degree, your verdict will be:

"We, the jury, find the within named W. E. Rakes guilty of conspiring as charged and also guilty of murder in the first degree."

338 (16) If you find the defendant guilty of conspiring as charged and also guilty of murder in the second degree your verdict will be:

"We, the jury, find the within named W. E. Rakes guilty of conspiring as charged and also guilty of murder in the second degree and we fix his punishment for said last mentioned offense at imprisonment in the penitentiary for —— years." The term of imprisonment being not less than five nor more than eighteen years.

339 To the action of the court in giving each of said instructions the defendant, by counsel, then and there excepted, and for grounds of his exceptions submitted the following reasons:

That the statement (b), on page 2 of the court's instructions, that the said act is intended and designed to prevent and forbid those physical acts of violence and outrage such as would result from the formation of such conspiracies is improper in this case, for this, that the defendant is charged with a murder and a conspiracy and that the said indictment does not allege and the evidence does not show that the act of the murder charged was or could have been done in the act of violating the provisions of section 5508.

To clause 2, paragraph (b), page 2 of said instruction, to the effect that such a conspiracy may be implied is improper and misleading.

That in that portion of the charge, found on page 3, addressed to the credibility of the witnesses, the court erred because the same fails to call to the attention of the jury the effort made on the part of the defendant to impeach several witnesses of the Government, and failed to give the instruction No. 16, offered by the defendant in that behalf. That the court erred in that portion of clause 6, paragraph (b), found upon page 4 of the court's instructions, to the effect that the mere fact that some of the alleged conspirators may have been actuated by some motive not connected with informing by Peter Hall is not ground for acquittal, if you believe beyond a reasonable doubt that at least one of such other alleged conspirators and the defendant conspired to injure or intimidate said Peter Hall mainly and

340 chiefly because said Peter Hall had exercised his rights as an informer, is erroneous and misleading for this, there was no evidence to support the contention that the defendant conspired to intimidate said Hall for the reason assigned, and there was not sufficient evidence upon this point to go to the jury; and further that the court should have instructed the jury that if from the evidence they entertained any reasonable doubt as to the motive which actuated the defendant and any other of the alleged coconspirators to form the alleged conspiracy, they should acquit the defendant of the charge of the conspiracy, and that it was improper to submit to the jury the question of comparing the relative weight and importance of the several motives which might under the evidence have actuated the defendant and his alleged coconspirators. Clause 6, paragraph (b), of said instruction, found upon page 4, which reads as follows:

"It follows that if you believe beyond all reasonable doubt that the defendant conspired with one or more of the persons indicted with the defendant to injure, oppress, threaten, or intimidate said Peter Hall in the free exercise and enjoyment of the right to act as an informer of offenses against the Federal revenue laws, or because

of his having exercised said right, you should find said defendant guilty of conspiring under section 5508, U. S. Rev. Stats., is erroneous and misleading for this, there is no evidence to support the said instruction and there was not sufficient evidence of the alleged conspiracy to go to the jury.

That in clause 7 of section (b), on pages 4 and 5 of the instructions given by the court, the court erred in instructing the
341 jury that if under and in accordance with the foregoing instructions you find the defendant guilty of conspiring as charged, you must then consider and determine whether or not he is guilty of any other felony or misdemeanor committed in attempting to effectuate, or in pursuance of, said conspiracy, is erroneous and misleading for this, that section 5509 relates only to such offenses as are committed in the act of violating the provisions of section 5508, to wit: In the act of forming the conspiracy and further that the said instruction authorizes the jury to find the defendant guilty of two offenses under the same count in the same indictment, which is a deprivation of his constitutional right.

That the instructions of the court found in clauses 8, 9, 10, 11, on pages 5 and 6 of the instructions given by the court, are erroneous for this, that it was improper and a denial of a constitutional right of the defendant to try defendant for the crime of murder and of conspiracy under the same count in the same indictment; that under no view of the case could the alleged murder be murder of the first degree under the laws of Virginia; that there was no evidence of any malice or premeditation on the part of the defendant such as to constitute the alleged crime of murder *murder* of the first degree under the laws of Virginia; that the liability of the defendant, if any, for the act of any of the alleged coconspirators was through the relation of principal and agent growing out of and traceable to the said conspiracy and that there was no evidence that the purpose or object of the said conspiracy was to commit murder or any other felony or misdemeanor; that under the evidence there could have been no
342 premeditation or malice as against Ann Hall, as the conspiracy was not conceived as charged in the indictment or as shown by the evidence in any wise in reference to her; that it was error to instruct the jury that a premeditation on the part of the defendant or any of his coconspirators to kill Peter Hall, which resulted in the death of Ann Hall, could trace to the killing of said Ann Hall the premeditation necessary to constitute the crime of murder in the first degree; that there was no evidence to support said instruction; that there was not sufficient evidence to go to the jury upon the questions therein set out; that instruction in clause 15, section (b), found on page 7 of the instructions given by the court, was erroneous and misleading for this, that it authorized the jury to find the defendant guilty of two distinct offenses punishable by two separate and distinct punishments under the same count in the same indictment, which in effect authorized a double punishment under one count in one indictment, which in effect deprived the defendant of his constitu-

tional right of exemption from double jeopardy, and that the instruction contained in clause 16 is erroneous for the same reasons.

That the court erred in not adding to said instructions each of the seventeen several instructions offered by the defendant; that the court should have instructed the jury that before they could find the defendant guilty they must find that he and some other conspirator formed the said conspiracy as charged, because the said Peter Hall was an informer of violations of the revenue law as charged in the indictment, and that any reasonable doubt as to the motive actuating such conspiracy was ground for acquittal; and that the court should have instructed the jury that in ascertaining the motive
343 which actuated the alleged conspirators they must attribute to the alleged conspirators any motive consistent with their innocence under the Federal law which could be reasonably reconciled to all of the evidence, and that they should take into consideration all of the relations existing between the said Peter Hall and all or any of the alleged conspirators, and that the defendant was upon trial for the conspiracy alone and that an offense done in pursuance to such conspiracy are to be considered only in connection with and as punishment for said conspiracy.

That the court should have instructed the jury that it was necessary that the common motive in violation of the Federal statutes must be known at least to the defendant and some one other of the alleged conspirators and acquiesced in by the defendant and at least one other of the said alleged conspirators, and that the court should have instructed the jury that if they entertained any doubt as to who fired the fatal shot they should give the defendant the benefit of such doubt.

The court should have instructed the jury that the defendant was not responsible for any motive which was a fresh and independent product of the mind of any one of the conspirators other than himself outside of and foreign to the common design and purpose, and should have further instructed the jury that the voluntary killing of a human being resulting from the commission of a crime not a felony is voluntary manslaughter, and further that the conspiracy as charged in the indictment was a misdemeanor and not a felony. and should have further instructed the jury that involuntary manslaughter under the laws of Virginia is an unintentional kill-
344 ing of a human being resulting from an act unlawful but not felonious, and that if there was sufficient evidence to go to the jury upon the guilt or innocence of the defendant as to the conspiracy charged in the indictment there was likewise sufficient evidence for the jury to consider whether or not the sole purpose and object of the conspiracy was not merely to alarm and intimidate the said Peter Hall without intent to kill or injure him, and that if the jury should so find, the defendant was not guilty of any offense under the State law; and that the court should have further instructed the jury that they should find from the evidence that the defendant or some one other of his coconspirators had actual knowledge of the fact or ground for belief that Peter Hall was or was about to become an informer

under the Federal law before they could find the defendant guilty of the alleged conspiracy.

345 To which action of the court in giving each of said instructions the defendant by counsel then and there excepted.

Wherefore, in as much as the matters herein set forth do not otherwise appear of record in this cause the defendant tenders this his bill of exceptions No. 7, and prays that the same may be signed and sealed, and all and several the points therein set up be saved to him, which is accordingly done this 9th day of December, 1907.

HENRY C. McDOWELL [SEAL],
District Judge.

346 *Defendant's bill of exceptions No. 8.*

Filed December 9, 1907.

In the District Court of the United States for the Western District of Virginia.

THE UNITED STATES
v.
WILLIAM E. RAKES.

Defendant's bill of exceptions No. 8.

Be it known that after the jury had returned into court with its verdict, and after the motion of the defendant in arrest of judgment, and for a new trial, the court proceeded to pronounce sentence upon the defendant as set out by its order in this cause, which order the defendant, by counsel, moved the court to set aside, upon the ground that the court had imposed a double punishment for two separate and distinct offenses, and that the punishment so imposed was in excess of the verdict of the jury, unlawful and unconstitutional, which motion the court overruled, to which action of the court, the defendant, by counsel, then and there excepted, and tenders this his bill of exceptions No. 8, and prays that the same may be signed, sealed, and made a part of the record in this cause, which is accordingly done this 9th day of December, 1907.

HENRY C. McDOWELL [SEAL],
District Judge.

349 *Defendant's bill of exceptions No. 9.*

Filed December 9, 1907.

In the District Court of the United States for the Western District of Virginia.

THE UNITED STATES
v.
W. E. RAKES.
Upon an indictment for murder.

Defendant's bill of exceptions No. 9.

Be is known that upon the trial of this cause and after the filing of the defendant's special plea and the replication of the Government

thereto, the defendant, without waiving his objection theretofore made, but insisting on the same, tendered his special rejoinder in words and figures as follows:

The defendant W. E. Rakes, not waiving his objection to the filing of the special replication, but insisting thereon, objects to the action of the court in overruling the motion to strike out said replication.

Whereupon the said defendant says:

1st. That his bail bond in said circuit court of Patrick County is in full force and effect.

2nd. That his surety upon said bond is here present in court.

3rd. That the Commonwealth's attorney for the county of Patrick is here present in court.

And this he is ready to verify. Which special rejoinder the court refused to permit the defendant to file, to which action of the court, the defendant by counsel then and there excepted.

350 Wherefore, in as much as the matters herein set out, do not otherwise appear of record in this cause, the defendant tenders this his bill of exceptions No. 9, and prays that the same may be signed, sealed, and made a part of the records in this cause, which is accordingly done this 9th day of December, 1907.

HENRY C. MCDOWELL [SEAL],
District Judge.

351 *Appeal proceedings—Petition for writ of error.*

Filed December 13, 1907.

In the District Court of the United States for the Western District of Virginia.

THE UNITED STATES
v.
W. E. RAKES. } Upon an indictment for murder.

And now comes W. E. Rakes, defendant herein, and says:

That on or about the 16th day of October, 1907, the District Court of the United States for the Western District of Virgina entered a judgment herein of conviction against this defendant, in which judgment, and the proceeding had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

N. H. HAIRSTON,
WALLER R. STAPLES,
Attorneys for Defendant.

352 *Assignment of errors.*

Filed December 13, 1907.

In the District Court of the United States for the Western District of Virginia.

THE UNITED STATES
v.
W. E. RAKES. } Upon an indictment for murder.

The defendant in this proceeding, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred upon trial thereof, to wit:

The District Court of the United States erred:

1st. In not sustaining the motion of the defendant to exclude the replication to the special plea for the reason that the said replication did not set up any matter which was relevant or proper in respect to the facts set up in said plea.

2nd. In permitting the Government to withdraw its demurrer to the said plea after issue thereon had been joined and the said demurrer had been overruled. For the reason that having tendered the said demurrer the Government had admitted the facts in the said plea set up, and after having submitted the said demurrer to the judgement of the court, should be bound by the adjudication of the legal sufficiency of the facts so alleged.

3rd. In not sustaining the motion of the defendant to strike out the said replication for the following reasons: (a) That there is nothing in said replication which shows any reason why judgement upon said plea should be withheld from this defendant;
353 (b) that the said replication is wholly argumentative; (c) that the said replication purports to set up new matter, and is not properly verified; (d) that it was error of law to permit the filing of said replication.

4th. In striking out the special rejoinder filed by the defendant, set up in bill of exceptions No. 9, because the same was a proper defense, and answer to all of the matters set up in the Government's replication.

5th. In not entering judgement for the defendant upon the said special plea, notwithstanding the conclusions of the court as to the facts, because the defendant had confessed the facts in the plea set up, the legal sufficiency whereof had been adjudicated on the demurrer, and the matter offered by the said replication in avoidance of said plea was not proper.

6th. In not entering judgement for the defendant on his demurrer to the said indictment, because: (a) There had been no preliminary hearing accorded the defendant before indictment; (b) because the alleged conspiracy is charged as a conclusion of law and is not charged with sufficient certainty; (c) because the alleged right of

the said Peter Hall, secured to him by the Constitution and laws of the United States, is charged as a conclusion of law, and
354 is not charged with sufficient certainty; (d) because the alleged assault upon and murder of Ann Hall is not properly charged to have been done in the act of violating the provisions of section 5508 of the Revised Statutes; (e) because the said indictment seeks in each count thereof to charge two offenses against this defendant.

7th. In entering judgement for the Government on the said special plea, and in not entering judgement for the defendant thereon for the reasons heretofore assigned as number 5.

8th. In overruling the several motions of the defendant to exclude from the records and its consideration the evidence of the various witnesses adduced on the trial of the special plea, as set up in the defendant's bill of exceptions No. 1.

9th. In not instructing the jury to disregard all of the statement made by counsel for the Government in his opening statement, that Grover Beamer had been jointly indicted with this defendant, tried in this court, found guilty by a jury, and that sentence had not been pronounced upon him, and that he would introduce said Beamer as a witness in this case.

10th. In not sustaining the motion of the defendant to exclude all the evidence of the Government upon the ground that it was not sufficient to make out a prima facie case of conspiracy against this defendant as charged in the indictment.

355 11th. In overruling the defendant's motion to direct a verdict for the defendant upon the ground that the Government had not made out a prima facie case of conspiracy as charged in the indictment.

12th. In permitting the witness Peter Hall to state: "I don't reckon there's a branch on his (C. P. Nolin's) land anywhere that a distillery could be put up, but that there has been one," because it was irrelevant to the issue and tended to prejudice the minds of the jury to show that C. P. Nolin, brother-in-law of the defendant, owned land upon which distilleries were located.

13th. In allowing the witness Alexander Rakes to state that Bill Turner, father of Charlie Turner, met the witness on the street and said that the witness had better be careful; that if one side did not get him the other would. The defendant was not to be bound or prejudiced by statements of other parties, and to admit the evidence is to cause prejudice in the minds of the jury.

14th. In permitting the witness Alexander Rakes to detail a conversation with the defendant without first designating the time and place of such conversation.

15th. In permitting the Government to offer in evidence a gun which was claimed to have been the gun of Grover Beamer, but which had not been identified.

16th. In not permitting the wife of the defendant to testify in his behalf as to his whereabouts on the night of the alleged murder.

17th. In not permitting the defendant to prove by the wit-
356 ness J. J. Brammer and other witnesses that the said Peter Hall was a notorious and offensive character in the community, a general trespasser, and a petit thief, as well as a reckless character; that the better people in the community were afraid to leave their homes unprotected because of his dangerous character, and that the said Peter Hall had made threats against parties other than the defendants that he would destroy their property, and that such parties took precaution to prevent such destruction, among them a brother-in-law of the defendant, residing in that vicinity, employed the witness to watch out for said Peter Hall and to protect his property.

The object of this evidence was to show that there were other separate and sufficient reasons and motives why the defendant should have desired to run the said Peter Hall out of the county, other than the connection of the said Peter Hall with informing as to violations of the internal-revenue law, which alleged motive constituted the only ground of the jurisdiction of the Federal court.

18th. In overruling the motion of the defendant in arrest of judgment because: (a) The court should not have proceeded to try the defendant; (b) the verdict is not responsive to the issue; (c) the verdict is bad for duplicity.

19th. In not setting aside the said verdict because of the errors of law at the trial and because the evidence was wholly insufficient.

20th. In refusing to give each of the sixteen instructions
357 asked for by the defendant, and in giving the instructions given by the court for the following reasons:

That the statement (b) on page 2 of the court's instructions, that the said act is intended and designed to prevent and forbid those physical acts of violence and outrage such as would result from the formation of such conspiracies, is improper in this case, for this, that the defendant is charged with a murder and a conspiracy, and that the said indictment does not allege, and the evidence does not show that the act of the murder charged was or could have been done in the act of violating the provisions of section 5508.

To clause 2, paragraph (b), page 2, of said instruction, to the effect that such a conspiracy may be implied, is improper and misleading.

That in that portion of the charge found on page 3, addressed to the credibility of the witness, the court erred because the same fails to call to the attention of the jury the effort made on the part of the defendant to impeach several witnesses of the Government and failed to give the instruction No. 16 offered by the defendant in that behalf.

That the court erred in that portion of clause 6, paragraph (b), found upon page 4 of the court's instructions, to the effect that the mere fact that some of the alleged conspirators may have been actuated by some motive not connected with informing by Peter Hall is not ground for acquittal, if you believe beyond a reasonable doubt that at least one of such other alleged conspirators and the defendant

conspired to injure or intimidate said Peter Hall, mainly and chiefly because said Peter Hall had exercised his rights as an informer,
358 is erroneous and misleading, for this, there was no evidence to support the contention that the defendant conspired to intimidate said Hall for the reason assigned, and there was not sufficient evidence upon this point to go to the jury; and further, that the court should have instructed the jury that, if from the evidence, they entertained any reasonable doubt as to the motive which actuated the defendant and any other of the alleged conspirators to form the alleged conspiracy, they should acquit the defendant of the charge of conspiracy, and that it was improper to submit to the jury the question of comparing the relative weight and importance of the several motives which might, under the evidence, have actuated the defendant and his alleged coconspirators.

Clause 6, paragraph (b), of said instruction, found upon page 4, which reads as follows:

"It follows that if you believe beyond all reasonable doubt, that the defendant conspired with one or more of the persons indicted with the defendant to injure, oppress, threaten, or intimidate said Peter Hall in the free exercise and enjoyment of the right to act as an informer of offenses against the Federal revenue laws, or because of his having exercised said right, you should find said defendant guilty of conspiring under section 5508, U. S. Rev. Stats., is erroneous and misleading, for this, there is no evidence to support the said instruction, and there was not sufficient evidence of the alleged conspiracy to go to the jury.

That in clause 7 of section (b), on pages 4 and 5 of the
359 instructions given by the court, the court erred in instructing the jury that if under and in accordance with the foregoing instructions you find the defendant guilty of conspiring as charged you must then consider and determine whether or not he is guilty of any other felony or misdemeanor committed in attempting to effectuate, or in pursuance of, said conspiracy, is erroneous and misleading, for this, that section 5508 relates only to such offenses as are committed in the act of violating the provisions of section 5508, to wit, in the act of forming the conspiracy, and further, that the said instruction authorizes the jury to find the defendant guilty of two offenses under the same count in the same indictment, which is a deprivation of his constitutional right.

That the instructions of the court found in clauses 8, 9, 10, 11, on pages 5 and 6 of the instructions given by the court, are erroneous, for this, that it was improper and a denial of a constitutional right of the defendant to try defendant for the crime of murder and conspiracy under the same count in the same indictment; that under no view of the case could the alleged murder be murder of the first degree under the laws of Virginia; that there was no evidence of any malice or premeditation on the part of the defendant such as to constitute the alleged crime of murder of the first degree under the laws of

Virginia; that the liability of the defendant, if any, for the act of any of the alleged conspirators was through the relation of principal and agent, growing out of and traceable to the said conspiracy, and that there was no evidence that the purpose or object of the said
conspiracy was to commit murder or any other felony or mis-
360 demeanor; that under the evidence there could have been no
premeditation or malice as against Ann Hall, as the conspiracy was not conceived as charged in the indictment, or, as shown by the evidence, in any wise in reference to her; that it was error to instruct the jury that a premeditation on the part of the defendant, or any of his coconspirators, to kill Peter Hall, which resulted in the death of Ann Hall, could trace to the killing of said Ann Hall the premeditation necessary to constitute the crime of murder in the first degree; that there was no evidence to support said instruction; that there was not sufficient evidence to go to the jury upon the questions therein set out.

That instruction in clause 15, section (b), found on page 7 of the instructions given by the court, was erroneous and misleading, for this, that it authorized the jury to find the defendant guilty of two distinct offenses, punishable by two separate and distinct punishments, under the same count in the same indictment, which in effect authorized a double punishment under one count in one indictment, which in effect deprived the defendant of his constitutional right of exemption from double jeopardy, and that the instruction contained in clause 16 is erroneous for the same reasons.

That the court erred in not adding to said instructions each of the seventeen several instructions offered by the defendant; that the court should have instructed the jury that before they could find the defendant guilty they must find that he and some other conspirator formed the said conspiracy as charged, because the said Peter Hall was an
informer of violations of the revenue law, as charged in the
361 indictment, and that any reasonable doubt as to the motive
actuating such conspiracy was ground for acquittal, and that the court should have instructed the jury that in ascertaining the motive which actuated the alleged conspirators they just attribute to the alleged conspirators any motive consistent with their innocence under the Federal law, which could be reasonably reconciled to all of the evidence, and that they should take into consideration all of the relations existing between the said Peter Hall and all or any of the alleged conspirators, and that the defendant was upon trial for the conspiracy alone, and that an offense done in pursuance to such conspiracy is to be considered only in connection with, and as punishment for, said conspiracy.

The court should have instructed the jury that it was necessary that the common motive in violation of the Federal statutes must be known at least to the defendant and some one other of the alleged conspirators, and acquiesced in by the defendant and at least one other of the said alleged conspirators, and that the court should have

instructed the jury that if they entertained any doubt as to who fired the fatal shot they should give the defendant the benefit of such doubt.

The court should have instructed the jury that the defendant was not responsible for any motive which was a fresh and independent product of the mind of any one of the conspirators, other than himself, outside of and foreign to the common design and purpose, and should have further instructed the jury that the voluntary killing of a human being, resulting from the commission of a crime
362 not a felony, is voluntary manslaughter, and further that the conspiracy as charged in the indictment was a misdemeanor and not a felony, and should have further instructed the jury that involuntary manslaughter under the laws of Virginia is an unintentional killing of a human being, resulting from an act unlawful but not felonious, and that if there was sufficient evidence to go to the jury upon the guilt or innocence of the defendant as to the conspiracy charged in the indictment, there was likewise sufficient evidence for the jury to consider whether or not the sole purpose and object of the conspiracy was not merely to alarm and intimidate the said Peter Hall without intent to kill or injure him, and that if the jury should so find, the defendant was not guilty of any offense under the State law; and that the court should have further instructed the jury that they should find from the evidence that the defendant or some one other of his coconspirators had actual knowledge of the fact or ground for belief that Peter Hall was or was about to become an informer under the Federal law before they could find the defendant guilty of the alleged conspiracy.

21st. In overruling the motion of the defendant to vacate the judgment herein, because of the errors of law heretofore assigned, and further because the punishment imposed by the court was a double punishment, a punishment for two distinct and separate offenses under a single count in a single indictment was in excess of the verdict, and was in effect a deprivation to the defendant of his constitutional right to be put in jeopardy but once for one offense.

363 Wherefore the defendant prays that the judgment of the district court may be reversed.

N. H. HAIRSTON,
WALLER R. STAPLES,
Attorneys for Defendant.

And at another day, to wit, at a term of District Court of the United States for the Western District of Virginia, held at Lynchburg, on Friday, the 13th day of December, 1907.

Present: Honorable Henry C. McDowell, district judge.

364 *Order allowing writ of error.*

Entered December 13, 1907.

In the District Court of the United States for the Western District of Virginia.

Order allowing writ of error.

THE UNITED STATES
v.
W. E. RAKES. } Upon an indictment for murder.

This 13th day of December, 1907, comes the defendant by his attorney, and files herein and presents to the court his petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises. On consideration whereof, the court does allow the writ of error, and the same is to operate as a supersedeas without bond.

To the clerk of the District Court of the United States for the Western District of Virginia, at Lynchburg, Virginia:

Enter the foregoing order in the proper order book as of this 13th day of December, 1907.

HENRY C. MCDOWELL,
District Judge.

365 *Writ of error to the District Court of the United States for the Western District of Virginia.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judge of the District Court of the United States for the Western District of Virginia, greeting:

Because in the record of and proceedings, and also in the rendition of a judgment, of a plea which is in the said District Court, before you, between the United States and W. E. Rakes, defendant, upon an indictment, a manifest error has happened, to the great damage of the said W. E. Rakes, as by his complaint appears; we being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the

same at the city of Washington, on the 13th day of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of December, in the year of our
366 Lord One thousand nine hundred and seven, and of the Independence of the United States of America, the One hundred and thirty-two.

[SEAL.]

WM. MCCAULEY,
Clerk of the District Court of the United States for the Western District of Virginia.

Allowed by:

HENRY C. MCDOWELL,
District Judge.

Clerk's office of the District Court of the United States for the Western District of Virginia, at Lynchburg, the 13th day of December, 1907.

I hereby certify that a copy of the foregoing writ of error was this day filed in my said office.

WM. MCCAULEY,
Clerk of said District Court.

367 *Citation.*

UNITED STATES OF AMERICA, *ss.*

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at the clerk's office of the United States Supreme Court, in the city of Washington, D. C., on thirty days from this date pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Virginia, at Lynchburg, wherein Wm. E. Rakes is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Wm. E. Rakes, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry C. McDowell, United States district judge this the 13th day of December, 1907.

HENRY C. MCDOWELL,
United States District Judge.

367½ (Indorsed:) Service accepted.

SAML. H. HOER,
Assistant U. S. Attorney for the Western Dist. of Va.

368 *Order for transcript of record.*

And thereupon it was ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereto relating, be transmitted to the Supreme Court of the United States, and the same is transmitted accordingly.

Teste:

WM. MCCAULEY, *Clerk.*

Clerk's certificate.

UNITED STATES OF AMERICA,
Western District of Virginia, ss:

I, William McCauley, clerk of the District Court of the United States for the Western District of Virginia, at Lynchburg, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings in the cause in the caption mentioned, so far as the same relate to William E. Rakes, one of the defendants in said cause, now of record and on file in my said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at Lynchburg, in said district, this [SEAL.] 30th day of December, in the year of our Lord 1907, and in the 132nd year of the Independence of the United States of America.

WM. MCCAULEY,
Clerk of the District Court of the United States for the Western District of Virginia.

Fee for transcript of record $124.05.

369 (Indorsed on cover:) File No. 20985. W. Virginia, D. C. U. S. Term No. 257. W. E. Rakes, plaintiff in error, vs. The United States. Filed January 25th, 1908. File No. 20985.

O

IN THE

Supreme Court of the United States

W. E. RAKES, PLAINTIFF IN ERROR

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

MOTIONS.

FIRST.

TO ADVANCE THIS CAUSE.

Your petitioner, W. E. Rakes, respectfully represents:

1st. That he, plaintiff in error here in a proceedings to review a judgment of conviction under Sections 5508 and 5509 Revised Statutes entered by the United States District Court for the Western District of Virginia, whereby it was adjudged that he should serve FIFTEEN YEARS and one day in the Federal Penitentiary, and pay a fine of ONE HUNDRED DOLLARS.

2nd. That in May, 1908, this HONORABLE COURT, upon his motion upon proper showing as to his destitute condition, ordered that he be allowed to proceed *in forma pauperis.*

3rd. That he is represented in this Court by only one Attorney, namely, Waller R. Staples, who has

been by the General Assembly of Virginia elected as a member of its judiciary for the term commencing FEBRUARY FIRST, 1909, and who under the Constitution of that State is prohibited from engaging in the practice of the law either as to NEW or PENDING causes after said First Day of February, 1909.

4th. That he is advised that in due course his said cause would not be reached for argument before said FIRST day of FEBRUARY, 1909. and being wholly unable to employ and pay other counsel to become familiar with the voluminous record herein he would necessarily be deprived of the benefit of an argument of his said cause.

Wherefore your petitioner respectfully prays that his said cause be advanced on the Docket of this HONORABLE COURT so as to be reached for argument before the said FIRST day of FEBRUARY, 1909.

SECOND.

FOR BAIL.

Your petitioner would further respectfully represent:

That he is in bad health, that he has a family of 8 small children, the oldest being 15 years of age, the youngest 2 years of age. That his said family is destitute and dependent during his confinement solely upon the labors of themselves and their mother. That 6 members of his immediate family have within the last 6 years died from Tuberculoses, and that he believes that he has contracted, or is in great danger of contracting that dread disease. That he submits herewith the deposition of the Jail Physician, who is and has during his confinement been attending him, showing the condition of his health. That he believes that he can through the fidelity of a few friends, execute a bail bond in the sum of FIVE THOUSAND DOLLARS.

Wherefore your petitioner further prays:

That he may be admitted to bail pending the consideration by this HONORABLE COURT of his said WRIT of ERROR, and in the event of a judgment awarding a new trial herein, then that such bail be operative pending said new trial.

Respectfully submitted,

W. E. RAKES.

STATE OF VIRGINIA,
COUNTY OF FRANKLIN, } To-Wit:

I, Taylor Price, a Notary Public in and for the County and State aforesaid, do hereby certify that W. E. Rakes, whose name is signed to the foregoing petition, has this day personally appeared before me in my said County and made oath that the matters in said petition set up are true.

Given under my hand this 23rd day of November, 1908.

TAYLOR PRICE, N. P.

My commission expires Dec. 1, 1910.

Waller R Staples Attorney

In the Supreme Court of the United States

W. E. RAKES, PLAINTIFF IN ERROR
vs.
THE UNITED STATES.

The deposition of Dr. N. T. Greer, taken at the Office of the Clerk of the Circuit Court of Franklin County, Virginia, on the 20th day of November, 1908, at 11 a. m. by agreement between Thos. Lee Moore, United States Attorney for the Western District of Virginia, in behalf of the United States and Waller R. Staples, attorney for and on behalf of W. E. Rakes,

and which is to be exhibited on behalf of the plaintiff in error upon a motion for bail to be made in the above entitled cause and taken before T. W. Carper, a Commissioner in Chancery for the Circuit Court of Franklin County, Virginia, being an official of the State of Virginia, and authorized by law to take depositions with the same power and effect as a Notary Public.

Present, Hon. Waller R. Staples for Plaintiff in error.

Present, Hon. Thos. Lee Moore for Defendant in error.

N. T. Greer, a witness of lawful age, being first duly sworn says:

Question. I believe you have practiced medicine for 14 years, have been for 10 years jail physician for Franklin County, Virginia, and have been in attendance upon W. E. Rakes, the Plaintiff in error, for about 11 months during his confinement in said jail under an order of the Federal Court. Is that correct?

Answer. Yes, sir.

Question. How often have you visited him professionally during that period?

Answer. About once a week.

Question. From what troubles has he been suffering while under your care?

Answer. He has been suffering from bronchial trouble, chronic indigestion and nervousness; would hardly call it neuresthenia.

Question. Have you any reason to suspect that he has contracted tuberculosis?

Answer. I have thought once or twice that it was possible that he might have it, but have never diagnosed it as tuberculosis, his sputa has never been examined and it is almost impossible to determine in the early stages whether it is or not without an examination of the sputa.

Question. What effect in your opinion would confinement in jail have upon these troubles?

Answer. I think it would necessarily aggravate the chronic indigestion and nervousness.

Question. How as to bronchial troubles?

Answer. I think it operates to hinder a recovery from the bronchial trouble.

Question. What would you say will be the probable effect of a further continued confinement upon his health?

Answer. It would be probably detrimental to his health but I couldn't say to what extent. It would certainly be to some extent.

Question. What would be the effect of such confinement if he had tuberculosis?

Answer. It would be detrimental to him. Upon a positive diagnosis of tuberculosis it would be disastrous.

Question. Is his physical condition better or worse than when you first visited him?

Answer. I think it is worse.

Question. If you were at liberty to prescribe treatment and conduct for him with a view to preserving his health or restoring the same what would you prescribe?

Answer. I wouldn't prescribe confinement in the County Jail but would prescribe open air and exercise.

CROSS EXAMINED.

Question. To what extent as nearly as you can say has the confinement of this prisoner been detrimental to his health?

Answer. I don't know whether I can say to what extent; it has been detrimental to a certain extent but I can't say to what extent, he is more emaciated and he suffers more from indigestion. This is natural as the result of his confinement and would be so with nearly all cases of confinement where the prisoner is so affected.

Question. Would or not his confinement in jail

for several months as testified to by you have the effect of making him nervous or aggrevating his indigestion?

Answer. I think it would to a certain extent.

Question. Might not his ten months of confinement in jail have naturally resulted in the indigestion and nervous trouble to which you have referred?

Answer. It is possible that it is the cause of it.

Question. In so far as the nervous trouble and indigestion to which you have referred is concerned is the effect of such confinement any worse upon this prisoner than upon the average prisoners you have been called to attend during your ten years' experience as Jail physician?

Answer. Well I think it is; a great many prisoners are not affected at all by confinement.

Question. What is your best opinion from his present physical condition considering all ailments of which you have knowledge from which the prisoner may be suffering as to whether or not a few weeks or a few months further confinement of this prisoner would result fatally?

Answer. I couldn't say that I think it would result fatally but might injure his health to a certain extent but I couldn't say to what extent.

Question. From your observation of him during the last ten months confinement, having visited him about once a week according to your recollection, are you now able to say that he has decided or pronounced symptoms of tuberculosis?

Answer. I have seen some symptoms along but have not seen anything that would warrant me in making a diagnosis for tuberculosis.

And further this deponent sayeth not.

Virginia, Franklin County, to-wit:

The foregoing depositions of Dr. N. T. Greer were taken, subscribed and sworn to before me, T. W. Carper, Commissioner in Chancery of the Circuit

Court of Franklin County at the time and place mentioned in the caption above.

Given under my hand this the 20th day of November, 1908.

.....

Comm'r in Chan'y Franklin Cir. Court, Va.

The original of the foregoing papers, all duly certified have been filed with the clerk of this court.

IN THE

Supreme Court of the United States

W. E. RAKES
v.
UNITED STATES

Upon a Writ of Error to the District Court of the United States for the Western District of Virginia.

MOTION.

The plaintiff in error, under the terms and provisions of Section 878 of the Revised Statutes, moves the Court for an order directing the printing of the record herein and the payment therefor out of the Treasury of the United States, as well as for the payment out of said Treasury of the proper fees of the Clerk of the District Court for copying and certifying said record.

In the case of the United States v. Richard Jones, 193 U. S., p. 528, the Court, speaking through the Honorable the Chief Justice, said (on page 530):

> "The indigent defendant ought not to be deprived of availing himself of his writ of error because of his poverty, and when the Court has ordered the transcript in the interests of justice, the Clerk ought not to be deprived of compensation."

Counsel for plaintiff in error tenders to the Court the petition of said plaintiff in error duly verified.

Respectfully submitted,

WALLER R. STAPLES,
Counsel for Plaintiff in Error.

PETITION.

To the Honorables, the Judges of the Supreme Court of the United States:

Your petitioner, W. E. Rakes, would respectfully show unto your Honors:

1st. That he has been tried in the District Court of the United States for the Western District of Virginia, at the September (1907) term thereof, upon a charge of conspiracy and murder, found guilty, and a judgment of conviction entered therein.

2d. That a writ of error to the Supreme Court of the United States was awarded to your petitioner by the honorable Judge of said District Court.

3d. That the record in said cause has been returned to this Court pursuant to said writ of error, and that the same is docketed herein as No. 582 of the October (1907) term.

4th. That your petitioner is in dire poverty, wholly without means of any kind; is destitute of property, real or personal; is confined in jail pending the prosecution of his said writ of error, and is wholly and totally unable to pay to the Clerk of said District Court his fees for copying and certifying the record in said cause, or for the printing of said record now lodged in this Court.

Wherefore, your petitioner respectfully prays that under the laws and statutes of the United States said fees and costs may, by this honorable Court, be ordered to be paid out of the Treasury of the United States.

And as in duty bound, your petitioner will ever pray.

W. E. RAKES,
Petitioner.

STATE OF VIRGINIA,
COUNTY OF FRANKLIN, } To wit:

This day personally appeared before me, W. E. Rakes, a Deputy Clerk in and for the county and State aforesaid, in my said county, W. E. Rakes, who being by me first duly sworn, stated upon oath that he is the petitioner named in the foregoing paper, and that the things therein stated are true.

Given under my hand this 27th day of April, 1908.

T. W. CARPER,
Deputy Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

W. E. RAKES, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 257.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

MEMORANDUM OF THE UNITED STATES ON MOTIONS TO ADVANCE AND TO ADMIT TO BAIL.

The court has permitted the plaintiff in error to proceed *in forma pauperis*. He now moves to advance on the ground that his counsel, having been elected to the judiciary of the State of Virginia, will not be able to argue the cause after February 1, 1909. The Government neither consents nor opposes this motion, but submits the matter altogether to the court.

As to the motion that the plaintiff in error be admitted to bail, the testimony of the jail physician is substantially that Rakes's general condition shows the effect of the lack of open air and exercise naturally due to his confinement in jail, but that this

is the extent of the injury to his health, and that nothing warrants a diagnosis for tuberculosis. Under these circumstances I submit that there is no hardship in his continued confinement, especially if his case is advanced for hearing, as he now requests. It must be remembered that he was convicted and sentenced on charges of conspiracy and murder actually committed under sections 5508, 5509, Revised Statutes.

HENRY M. HOYT,
Solicitor-General.

O

In the Supreme Court of the United States

W. E. RAKES, PLAINTIFF IN ERROR

vs.

THE UNITED STATES.

OCTOBER TERM, 1908.

NO. 257.

Opening Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This is a writ of error to a judgment of the United States District Court Western District of Virginia, by which plaintiff in error, W. E. Rakes, was sentenced to the penitentiary for fifteen years and one day, and fined $100.00 for an alleged violation of Section 5508 and 5509 Revised Statutes.

On the night of March 24, 1907, about 2:00 a. m. Ann Hall was killed in her home in Patrick county, in the Western District of Virginia, by a wound from several small bird shot, supposedly fired from without said building.

It appears from her surviving sister, Jane Hall, that these two aged women were aroused by the barking of a dog, followed by the firing of a gun. Jane Hall arose, went to the door and was confronted by

five armed men, who she claims to have identified as W. E. Rakes, (plaintiff in error) Grover Beamer, Peach Rakes, George Booth, and George Martin. To quote her testimony (Record p. 108).

"They divided and went round the house. I opened the door, and left the door open. We started to the fire and she (Ann Hall) said 'My arm is ruined.' Then she fell to the floor, and the next word she said, 'I am done, I am done.' After they quit shooting Grover Beamer busted the door open and came in the house. They first came to the door; Will, and the bunch of men came to the open door. I knowed Will just as soon as he came to the door."

On March 25th, a Coroner's inquest determined that Ann Hall was murdered and that the plaintiff in error and Grover Beamer were accessories to said murder.

On March 26th, plaintiff in error executed before a Justice of the Peace for said county his recognizance to appear on the first day of the May, 1907, term of the Circuit Court of Patrick county, to answer any indictment found against him. He appeared on the first day of said term, surrendered himself, was indicted for the murder of Ann Hall and admitted to bail by said State Court, to appear to answer said indictment at the first day of the next (August, 1907) term. He was shortly thereafter arrested by a Federal officer upon a warrant charging illicit distilling, and later upon a capias, issued pursuant to an indictment, in effect the same as that herein, found by a Grand Jury of the United States District Court for the Western District of Virginia.

He continued in the lawful custody of the State of Virginia by reason of the pendency of his bail but in detention by the United States until the 13th day of September, 1907, when in custody of the Marshall for said District, he was carried to the then sitting Lynchburg, Virginia, term of said District Court upon which date the indictment herein of record, was returned

against the plaintiff in error, together with Grover Beamer, Peach Rakes, George Booth, and George Martin. When this indictment was returned the plaintiff in error being set to the bar of the Court; the August term of the Circuit Court for the county of Patrick, to which his bond required his appearance, still being in term, he, in his own proper person, tendered to said United States Court his special plea duly verified setting up these facts, alleging that the State Court had first acquired jurisdiction of his person to answer the charge of said murder, and praying that said Federal Court should no further proceed with his trial until the indictment then pending in the State Court, was disposed of.

The United States demurred to the plea, which demurrer was overruled, and the order overruling the demurrer then entered. The United States then tendered its special replication to said plea, but the defendant objected to the filing thereof, asking for judgment upon said plea after demurrer overruled. The Court refusing, said judgment permitted the United States, over the defendant's objection, to with-draw its demurrer after joinder therein and judgment over-ruling the same.

Thereupon the United States taking issue neither upon the facts in the said plea set up, the form or manner of their allegations, or the legal sufficiency thereof, was permitted to file its special replication to said plea which the defendant moved to reject for reasons stated in writing (p. 6 record) in substance because it neither traversed or avoided the facts set up in said plea, but this motion was over-ruled. The said replication (Record p. 12) is epitomized to the effect that the Commonwealth's Attorney for Patrick county, Virginia, had, upon the happening of this tragedy, communicated with the United States District Attorney, and had continuously thereafter been in co-operation with the Federal Authorities in searching out the evidence against the parties indicted; that the State

Authorities had made no preparation for trial; that the Commonwealth of Virginia had not appeared at the Bar of the United States District Court seeking the custody of the defendant; that the defendant while in the physical detention of the United States Marshall had not appeared at the Bar of the State Court demanding trial; that the "officials of Patrick county" BELIEVED that the jurisdiction of the State Court had been relinquished; that the United States had prepared for trial AT GREAT EXPENSE, and that the State of Virginia had issued no process for the purpose of taking the defendant from the custody of the United States Marshall.

The defendant thereupon seeking to meet any matter in said special replication which might relate to said plea in its possible legal effect, tendered his special rejoinder in writing, setting up among other things (Record p. 14) that his bail bond in said State Court was in full force and effect, but this paper was rejected and defendant was compelled to join issue on said special replication, and hearing was by consent had before the Court without a jury upon the issue so joined.

The evidence adduced (Bill of Exceptions No. 1, Record p. 21) is in substance that the allegations of the plea were correct, the bond was still in force, the August, 1907, term of the State Court, although not actually sitting, was still in term unadjourned, that the statements in the special replication contained were practically true, except that the Commonwealth's Attorney of Patrick county, called by the Court as a witness on said issue, testified that the question of jurisdiction had never been discussed between himself and the United States Attorney, nor had he requested that the United States take jurisdiction of the case. Upon being asked by the Court whether he, as Commonwealth's Attorney for the State Court, desired to move for custody of the defendant, he declined to answer until he had conferred with the Judge of the State

Court, whereupon this hearing was adjourned from Saturday until Tuesday, in which time the witness left the stand, traveled into the county of Franklin, had an interview with the Judge of the Circuit Court of Patrick county, while said Judge was in another (to-wit Franklin) county, ascertained the *individual* views of said Judge, came back, resumed the stand and declined to move for the custody of the defendant.

In the course of this hearing numerous exceptions were taken to the admission by the Court of evidence thought to be irrelevant to this issue. These will be later discussed at length. The Court having intimated its conclusion upon both questions of law and fact upon the issue, the defendant requested the Court first to find whether the United States or the defendant had maintained the issue, which issue the Court adjudged had been maintained by the United States, whereupon the defendant moved for a judgment on said plea *non obstante*, but the Court entered judgment thereon for the United States.

This prosecution is predicted upon Sections 5508 and 5509 of the Revised Statutes.

Section 5508 provides *inter alia*, that if two or more persons shall conspire together to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, they shall be punished as therein provided. This section further provides for the punishment of any two or more persons who shall go in disguise upon a public highway, or upon the premises of another with intent to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of the rights or privileges aforesaid.

Section 5509 provides that if in the act of violating any of the provisions of either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same,

with such punishment as is attached to such felony or misdemeanor by the laws of the State in which such offense is committed.

It is the theory of the prosecution that in December, 1906, one Peter Hall, a citizen of the county of Patrick, Virginia, gave information to a United States Deputy Marshall to the effect that the plaintiff in error was engaged in the illegal operation of a distillery. That in February, 1907, the said Peter Hall gave to a United States Deputy Marshall information to the effect that Grover Beamer, one of the co-defendants, was engaged in the illegal operation of a distillery. That the plaintiff in error was arrested upon the information so given, a preliminary examination was had, and he was discharged because there was not sufficient evidence to justify sending him on to the grand jury. That Grover Beamer was never arrested upon the information given by Peter Hall nor any warrant sworn out for his arrest for said illegal operation. That the plaintiff in error and three of the remaining co-defendants, but not Grover Beamer, met together on Sunday, March 24th, at a distillery near the residence of Peach Rakes, one of the co-defendants, and there formed a conspiracy to oppress, threaten, and intimidate Peter Hall, because of his having made the two reports aforesaid.

That the alleged conspirators remained there several hours, yet talked privately together not over five minutes of that time, separated early in the afternoon of that day, and that three of them, to-wit, plaintiff in error Beamer and Peach Rakes, were next seen together with one Charlie Turner at the residence of Elizabeth Hall, an Aunt of Peter Hall, about eight o'clock p. m. of Sunday, March 24th, and were then in search of Peter Hall. That not finding him, they, except Charlie Turner, continued together and were joined by defendants, Booth and Martin, and these were next seen at the residence of Ann Hall, about two a. m. of the same night, where they appeared and

demanded to see Peter Hall. That they appeared at the North door of the residence, and the door being opened by Jane Hall, the party separated, passing around either end of the building, and immediately seven shots were fired, one of them through a window, one or two of them through a three-quarter inch poplar door, and the remainder were fired into the outside wall of the house. That the shots fired were all small bird shot, between No. 4 and No. 6; that loaded cartridges were found in the yard upon the ground near some empty shells, and that these former contained bird shot; that they were fired from two guns known as 12 and 16 guage shot guns, and that several of these shots took effect in the person of Ann Hall, one of them cutting an artery, causing her death within about ten minutes.

That the motive actuating the conspiracy was an ill will against Peter Hall, because of his having given the information aforesaid. That having agreed together to threaten and intimidate Peter Hall, they were each guilty of a violation of the provision of section 5508, and that while upon their mission with the purpose to threaten and intimidate Peter Hall for the reason aforesaid, and in an attempt to kill the said Peter Hall, Ann Hall having been killed, the defendants were each of them guilty of the murder of Ann Hall as the result of an attempt to murder Peter Hall, and that the offense comes within the scope of Federal authority, by reason of the original occasion of their ill feelings against Peter Hall. In other words, that because in the formation of the conspiracy the defendants having violated the provisions of Section 5508 the Federal Government thereupon immediately assumed a police control of all and several the acts and doings of each and every one of them until the object of the conspiracy had been consummated, or the conspiracy itself had been abandoned. That if two persons conspire together in violation of the Federal law, there will be given to the Federal Government a jurisdiction over their persons

and all their conduct during the whole life of the conspiracy.

That the Federal Government having thus by the act of the parties, been placed in guardianship of their conduct, it then transpired that the whole course of that conduct constituted one continuous and uninterrupted violation of the Federal Law, which might be the subject of one general indictment, but to which might be attached as many separate and distinct punishments as there were overt acts done during this period of Federal guardianship and to be measured by the sum of the punishments which the laws of the State of Virginia accorded to the several acts which might be attempted or consummated during that period of Federal supervision.

Hence the United States grand jury returned an indictment which charged in effect as follows: That on the ——— day of March, 1907, William E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and others unknown, conspired to injure, oppress, threaten, and intimidate Peter Hall in the free exercise of his Federal right, to-wit, of giving information to the officers of the United States of violations of the Internal Revenue Law by W. E. Rakes, Grover Beamer, and others; that the said Peter Hall had reported the said Rakes and Beamer to the United States officials for the violation of the Revenue Laws, and that while "in the act of so combining, conspiring, and agreeing together and amongst themselves as aforesaid, and for the purposes aforesaid, did with intent to threaten, BEAT, injure, KILL and intimidate Peter Hall, and in the furtherance of such attempt, and in attempting to execute the said conspiracy," kill Ann Hall.

That the said defendants did commit the crime of conspiracy and also the crime of murder under the laws of Virginia, concluding against the Statute and the peace and dignity of the United States.

The second count of the indictment is a replica of the first count, only somewhat amplified.

It will be noted that the United States has charged in *each* count of one indictment a violation of the provisions of both sections 5508 and 5509, and have thus proceeded upon the theory that the crime of the conspiracy constitutes the body of the offense, and gives jurisdiction to the Federal Court, and that the act of murder charged in the indictment is treated as an overt act pursuant to the conspiracy not otherwise cognizable by the Federal Court, and not punishable by the Federal Court as such, but only punishable as a part of the conspiracy, the measure of this part of the punishment to be determined by reference to the State Law.

It is also assumed by the form of the indictment that any other felony, or misdemeanor which may be in violation of the State Law committed during the life of the conspiracy, becomes a part of the conspiracy whether the INTENT with which that act was done, was or was not the intent, motive or purpose which actuated and gave Federal Jurisdiction over the conspiracy itself.

To this indictment defendant demurred, upon grounds which are in substance as follows:

Because the conspiracy was not charged with sufficient certainty, or so as to constitute an offense under the Federal Law; because the assault upon, and murder of Ann Hall was not so charged as to bring it within the proper scope of a Constitutional Federal Statute, but was so charged as to make the indictment bad for duplicity.

The demurrer was overruled, and the defendant plead not guilty and the trial was begun. Much testimony was admitted at the instance of the Government over the objection of the defendant, only small parts of which are assigned as error, because of what counsel for plaintiff in error take to be the conclusive character of

those rulings which have been selected for such assignments.

Those selected are to the effect that a witness was permitted to state that there was not a branch on the large farm of C. P. Nolan, a brother-in-law of the plaintiff in error, upon which an illicit distillery had not been run. That a witness was allowed to state a conversation upon the streets of Lynchburg between himself and one Bill Turner, who is not charged to have been involved in this offense, and which was interpretated by the Government as an intimidation by the said Bill Turner to prevent said witness from testifying freely for the Government, and in permitting the same witness to detail an alleged conversation with the plaintiff in error without having designated the time or place thereof. (Bill of Exceptions No. 3, Record p. 170).

It is further assigned as error that the Court permitted the Government to offer in evidence a certain shot gun, which was in no wise identified or sought to be identified as ever having belonged to, or been in the possession of either of the parties charged in this indictment.

It being the theory of the Government that the alleged conspiracy was conceived because of the fact that Peter Hall was an informer, the defendant sought to show that whoever committed the offense charged, were more probably actuated by the general bad character of the said Peter Hall, than by his practice and occupation as an informer; that the said Peter Hall was a reckless and dangerous character, a petit thief, and a man from whom the neighbors generally had to protect their families, their homes, and their farms by guards posted during their absence from home.

The Court excluded all such evidence, but offered to permit the defendant to show that he or either of his co-defendants *were actuated by* such other motive.

At the conclusion of the evidence for the Government, defendant moved to exclude the same from the

jury upon the ground that there was not sufficient evidence to make out a *prima facia* case of such a conspiracy as was prohibited by the Federal Statute, but the Court overruled this motion; thereupon defendant offered to prove his whereabouts at the time of the alleged killing, by the testimony of his wife, but the Court ruled that she was incompetent as a witness.

The defendant then offered eight citizens of high standing, four of whom were Government witnesses, among them a minister of the Gospel, and two officials of the county of Patrick, who testified with unanimity that neither of the three prosecuting witnesses, to-wit, Jane Hall, Peter Hall, or Ben Hall, could be believed upon oath in a matter in which they had any prejudice or interest, the prejudice of each of these witnesses against the plaintiff in error and two of his co-defendants having been brought out by cross-examination.

At the conclusion of all the testimony, defendant renewed his motion to exclude all the evidence, which was overruled, and he then tendered to the Court in writing seventeen several instructions (Record pp. 174-178) which in part expressed his view of the proper law of the case, and which in part expressed his contention of his right to a modification of the views of the Court upon the questions of law which had from time to time been expressed by its rulings during the trial. All of these instructions were refused, and in lieu thereof the Court read from a written charge to the jury (Record p. 178) each part and parcel of which had been in chambers discussed with the Court and Government counsel by counsel for the defendant and their objections thereto pointed out at length.

After the case had been argued by counsel, the jury retired and returned its verdict, which was as follows:

"We, the jury find the within named defendant, W. E. Rakes, guilty of conspiring as charged, and also guilty of murder in the second degree, and we fix his punishment for said last mentioned offense at im-

prisonment in the penitentiary for fifteen years." (Record p. 19).

Upon this verdict the defendant moved the Court in arrest of judgment and subsequently for a new trial upon grounds assigned at the time, (Record pp. 173-174) which the Court overruled, and entered judgment, that the plaintiff in error be imprisoned in the Penitentiary for fifteen years and one day, and pay a fine of $100.00, which judgment the defendant moved the Court to set aside upon the ground that it had imposed a double punishment; that the punishment was in excess of the verdict of the jury, and was unlawful and unconstitutional. But the Court overruled the motion and the judgment so entered is the judgment here complained of.

Conceiving that the Court had improperly adjudged that it had jurisdiction of the defendant; that in ruling upon the demurrer it had given a construction to the Statutes beyond the constitutional power of Congress to enact, and that in the form of the verdict, and by the judgment of the Court the plaintiff in error had been subjected to a double jeopardy, and a double punishment for one alleged offense, plaintiff in error under the provisions of the Act of Congress defining the Appellate Jurisdiction of the Supreme Court of the United States in criminal cases, sued out his writ of error to this Honorable Court and respectfully submits herewith his reasons and the authority for the various assignments of error set forth in the record.

ERRORS COMPLAINED OF.

The errors complained of may be divided according to the seven several stages of the case, as follows:

1st.—The Defendant's Special Plea,

2nd.—The Demurrer to the Indictment.

3rd.—The Admission and Exclusion of Evidence.

4th.—The Sufficiency of the Evidence to Support a Verdict.

5th.—The Instruction.
6th.—The Form of the Verdict.
7th.—The Judgment.

FIRST.

THE DEFENDANT'S SPECIAL PLEA.

The first five and the seventh and eighth assignments of error (Record pp. 187-8) relate to the rulings of the Court in respect to this plea, and are in substance as follows:

1st. In not excluding the replication for the reason that it set up no matter relevant or proper in response to said plea

2nd. In permitting the Government to withdraw its demurrer after issue thereon joined and demurrer overruled.

3rd. In not striking out said replication because (a) that there is nothing therein showing any reason why judgment should be withheld from defendant; (b) that said replication was wholly argumentative; (c) that it was error to permit the filing of said replication.

4th. In striking out the special rejoinder because the same was a proper defense, and answer to the matters set up in the replication.

5th. In not entering judgment for the defendant upon the said plea, notwithstanding the conclusions of the Court as to the facts.

7th. In entering judgment for the Government on the said special plea, and in not entering judgment for the defendant thereon.

8th. In overruling the several motions of the defendant to exclude from the records and its consideration the evidence of the various witnesses adduced on the trial of the special plea, as set up in the defendant's bill of exceptions No. 1.

This plea had set up that the Circuit Court of Patrick county, Virginia, had first acquired jurisdiction

over the person of this defendant. The United States demurred, and the demurrer was overruled. The United States then tendered its special replication but the defendant moved for judgment on the plea because demurrer overruled, but the Court refused to enter this judgment and allowed the United States to withdraw its demurrer and to file its replication.

The parties had gone to trial upon the issue joined upon the demurrer and the judgment had been pronounced. In the language of Judge Marshall in Mandyville v. Wilson 5 Cranch 18.

"After the parties have gone to trial upon set of pleadings and judgment has been pronounced, it is doubtful whether the Court can permit the demurrer to be withdrawn."

The demurrer having been withdrawn, the United States filed its special replication setting up in substance that the prosecuting officers for the State and the United States had co-operated in working up the evidence that the State had made no preparation for trial; that the State had not demanded the custody of the defendant, and that the defendant had not demanded a trial in the State Court, and further that the officials of Patrick county believed that the jurisdiction had been relinquished, and that the United States had prepared for trial at great expense.

It is respectfully submitted that neither of the facts alleged has the legal effect of avoiding the plea. As to the dealings and understanding between the two prosecuting officers, the defendant of course knew nothing. But even if it could have any legal effect whatever, the record shows that the States' officer had not so considered it, for after this alleged co-operation, he set the machinery of the State on motion, indicted, arrested, and detained the defendant in the State Court. This official act was the best and only proper evidence of his legal purpose.

The failure of the State authorities to make preparation for trial was irrelevant, as it was no legal evi-

dence of the intention of the State Court to relinquish its jurisdiction. The preparation is the act of a party litigant, and not the act of the Court. That the State had not demanded the custody of the defendant, was no answer to the plea, because the State Court had a right to rely upon the presumption that the Federal Court, when the former jurisdiction of the State Court was brought to its attention, would, pursuant to the time honored rule, refuse to proceed further in the premises. That the defendant had not demanded a trial in the State Court, was no answer because he had been in the physical detention of the United States Marshall. The opinion or belief of the officials of Patrick county that the State Court had relinquished its jurisdiction, is too irrelevant to discuss, as is the item of expense at which the Federal Government had prepared for trial.

Therefore this replication in no wise operated to avoid the plea.

The defendant having been compelled to join issue upon the replication, and the matters of law and fact having been submitted to the Court, the Court admitted evidence of the most irrelevant and informal character.

Aside from the Government's effort to show the facts set up in the replication, it undertook to show that the State Government was willing to relinquish its jurisdiction. This was in no wise within the scope of the replication, nor was leave asked to amend the pleadings to conform to the evidence adduced.

In a civil action under the Common Law upon a plea of former action pending, the issue must be tried upon the status of the case at the time of the filing of the plea. A dismissal of the former action after the filing of the plea, is of no avail.

"The plaintiff can not after a plea in abatement of the pendency of a prior suit, avoid the effect of a plea by discontinuing the first action which was pending at the time of the plea." Chitty's Pleadings, 13 Am.

Ed. Vol. 1, 454. Frogg's Exr. v. Long's Admr. 3 Dana 157. 28 Am. Dec. 69.

There have been some departures from this rule by the State Courts and under various statutes, but the rule obtaining in the Federal Courts is the rule under the Common Law as it existed in 1789.

"But no law of a State made since 1789 can effect the mode of proceding or the rules of evidence in criminal cases." United States v. Reed 12 Howard 356.

On such issue the fact of such dismissal can be tried only by the record of the State Court. I Cyc. 25, Note 28. Citing Evans v. Johnson 115 Cal. 180 46 Pacific 906.

If this is the true rule in a Civil case, it must be the more so in a criminal action.

It is settled beyond dispute that where proceedings respecting a specific subject matter of jurisdiction are instituted in two Courts, that Court which first acquires jurisdiction by the execution of its process upon the *res* in a Civil action or upon the person of the defendant in a criminal case, must first exhaust its function before the other Court can proceed. Taylor v. Taintor, 16 Wallace 366. Nor is the rule affected by the fact that the person under arrest is out on bail. Ib. The defendant continues in the custody of the Court whose process is first served, although he may be out on bail.

Even had the replication contained the allegation that the State of Virginia was willing to release its jurisdiction, it is submitted:

1st. That under the rule laid down by Mr. Chitty, this could be shown only by the action of the State Court taken before the time of the filing of the plea.

2nd. That whatever action the State Court might see fit to take could be evidenced only by its record, and

3rd. That there is no evidence whatever that the State Court undertook at any time to relinquish its jurisdiction. In the language of the learned trial Judge

(Record p. 42) such action by the State Court "can be legally shown only by the order of such Court."

No such record is offered in evidence. The record does show that no such dismissal was attempted. That the case was continued. When the State Court entered the order of continuance, it is conclusively presumed to have known of its jurisdiction over the person of the defendant, and that this jurisdiction could be released only by its order. The failure to enter the order is conclusive evidence of its retention of that jurisdiction. The State prosecutor when called upon to indicate whether or not he desired to make a motion for the custody of the defendant, said (Record p. 43) "I have not been called upon to waive any jurisdiction, but to make, or decline to make a motion to remand."

In *re* James 18 Fed. 853, the defendant was on bail for an offense cognizable only by the State Court. Proceedings to remove the defendant into another State were instituted in the Federal Court predicated upon an offense cognizable by the Federal Court of the State into which the defendant was sought to be removed. The defendant having been admitted to bail in the State Court, his bondsmen appeared in the Federal Court, objected to the removal and requested his release from detention by the United States. The Court held that the bondsmen were without interest in the premises, but that since the facts had been presented to the Court, even though this presentation was by parties without interest, and outside of the record, yet the defendant would be released. Holding in Syl. 4.

"The failure of the State to appear by its judicial officers to object to proceedings to remove a prisoner from the jurisdiction of its Court can make no difference where the right of the State fully appears and has been made known to the Court."

In the case at bar the prosecuting officer says: "I have not been called upon to waive any jurisdiction." Yet he asked leave to visit the Judge of the Circuit Court of Patrick county and obtain his views, which

leave was granted. The prosecuting officer was the representative of one of the parties litigant in the State Court.

In Virginia the Attorney for the Commonwealth has not the right which is accorded to such officers in many States to *nole prosequi* a case without consent of Court.

"The general Court (in Virginia then the Court of last resort in criminal cases) consisting of five Judges at the Fall term of 1803, unanimously decided "that the District Court Attorney has not a right to enter a *nole prosequi* in any case without the consent of the Court first had." First Virginia cases 139.

If it is granted that one party to this litigation had the right to set up the prior jurisdiction of the State Court, surely the other party had the same right. If neither party had the right, the Court should of its own motion recognize the same when brought to its attention, and should look only to the judicial action of the State Court to ascertain the purpose of the State Court.

In criminal cases the sovereignty of the State appears in two separate capacities:

1st.—In its juridicial function.

2nd.—As a party litigant.

In its first, standing as impartial between the defendant and itself in its second capactity as between A. and B. upon a Civil issue.

It is as shocking, not only to the judicial conscience, but to the common sense of right and fair dealing, that in its first capacity it should pervert its juridicial function out of consideration for the exigencies surrounding it in its second capacity, as that a Judge should try his own cause. Otherwise its judgment would be of expediency, and not of principle The individual Judge is presumed to be incapable of entirely separating interest from action, but the Sovereign State is accorded a higher attribute, and should be the more careful of its vindication.

Now, the right of the State to prosecute its indict ment is one thing, and the judicial control over the prisoner at the bar, standing in response to that indictment, is another.

Its interest *coad* the one is vested in its public prosecutor, *coad* the other in its Court in term. A private conference between that officer and the individual, who when upon the bench is Judge of that Court, but when off the bench is but a citizen, is as ineffectual to alter the legal status of a case as would be the private wished of the prisoner at the bar.

"Judicial acts can only be performed in term and by the Judge while presiding in the Court and exercising the judicial functions of the Court * * * * a Judge has no judicial power outside of the Court in which he officiates, or in other words, a Judge as an individual has no power to hear and determine any matter involving the exercise of judicial power." U. S. Life Ins. Co. Shattuck 43 N. E. 390-391.

"The Judge of a superior Court has no power to make at chambers in a county other than that where the issue is pending, any order, etc." Syl. 5 State v. Parsons 20 S. E. 512.

Yet the learned trial Judge forced this defendant to an issue predicated upon the manner in which the public prosecutor conducted his case, and upon a claim of fair dealing as between prosecuting officers of the two Governments concerning their priority of right to bring trial. Instead of asking for such order, the learned Judge of the District Court permitted the State's prosecutor to sound the individual inclination of the State Judge while he was off his bench, and then to determine his own course of conduct, (which was but the expression of the contention of one of the parties litigating in the State Court).

As was said above, this inquiry was beyond the scope of pleading, but if it were justified by the pleadings, it merely presents the situation as being one where two parties to the proceedings in the State

Court the stand in Federal Court, the one claiming the prior jurisdiction of the State Court, the other *merely refusing* to rely upon or to assert it. If the one party had no right to invoke this prior jurisdiction, the other party had no right to release it.

There was before the trial Court no proper evidence of any action or inaction by the State Court. The evidence adduced, if admissable upon any ground whatever, indicates only an unwillingness on the part of the State's prosecutor to demand the rights of the State and an unjudicial acquiescence (proven by hearsay) on the part of the individual who held the State's Commission as Judge of that Court.

Therefore, it is submitted that the District Court erred in failing to enter judgment for the defendant upon his special plea and in the several rulings leading thereto as hereinbefore set out.

SECOND.

THE DEMURRER TO THE INDICTMENT.

The sixth assignment of error (Record pp. 187-8) relates to the action of the Court upon the demurrer.

This had raised in the argument before the trial Court the question upon which the validity of its final judgment ultimately came to rest.

As before stated herein, it was the theory of the prosecution that the defendants conspired to threaten, oppress, injure and intimidate Peter Hall because of his having exercised "A Federal Right." That in executing this conspiracy Ann Hall was killed by some one of the conspirators, which one being unknown. That the conspirators were therefore each of them guilty of the murder of Ann Hall, and amenable therefor to the Federal Government because the object or purpose of the conspiracy came within the prohibition of 5508 Revised Statutes and the resulting murder was an incident to the acts violating the provision of that Section.

Looking at the case then in this light, we ask two questions:

First, What act is sought to be punished? and

Second, By what authority can that effort be consummated?

To the first question we find three several responses.

A. The conspiracy alone.

B. The murder alone.

C. The conspiracy and the murder taken together and constituting one offense.

Now, applying the second question to each of these offenses in their order, we find a separate response to each.

A. The conspiracy alone is clearly punishable under the provisions of Section 5508, the validity of which has been twice declared by this Court to be "no longer open to question."

B. The murder alone is clearly not punishable by the Federal Government as *Malum in se.* If punishable at all, it is because Sec. 5509 has made it so, and we are then confronted with the question, what power has Congress to enact such prohibition?

C. The murder as an element of the conspiracy and therefore punishable in connection therewith *and as a part thereof,* may or may not be cognizable by the Federal Court according to the validity and proper construction of 5509 taken together with 5508.

Now, these Sections read as follows:

"Sec. 5508, Rev. Stats.: If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same; * * * they shall be fined not more than $5,000, and imprisoned not more than ten years, and shall be thereafter ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States."

"Sec. 5509 Rev. Stats.: If in the act of violating any of the provisions of either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed."

Now in considering Section 5509 we must construe it either,

1st. As defining a new and separate offense, or

2nd. As merely defining a new and additional punishment for a violation of Secs. 5507 or 5508 under certain circumstances.

Now, as to the creation of a new and separate offense:

In Crookshank's case 92 U. S. 542, the Court used language which is quoted and paraphrased as follows:

"No right can be acquired under the Constitution or laws of the United States, except such as the Government of the United States has the authority to grant or secure."

No act can be punished under the authority of or by the United States, except such acts as the United States has the authority to prohibit.

Congress has no power to prohibit the crime of murder in Virginia. It is only when a particular murder operates to violate the sovereignty of the Unit . States that Congress can punish it.

While Congress may clearly punish any and all acts which operate to effect a violation of its proper laws, yet, it has no power to punish acts which merely transpire coincident with a violation of such proper laws.

It can not be said that because "A." sets out with a purpose to violate some proper Federal Law, that from that moment, and until he has accomplished or abandoned his purpose, the Federal Government has

assumed at once a watch and ward over his every act, and a guardianship over every element of the State's Sovereignty which his conduct may invade.

That each man whom he encounters—each beast of the field along his path—each boundary of land upon which his foot may fall, is suddenly clothed with a new protection which but for a distant purpose in his mind, was before unknown and unknowable to the Federal Government.

Congress can punish only such acts as violate the Federal Sovereignty, not every act of one who has a violation of that sovereignty in mind.

Now the Sec. 5509 reads:

"If in the act of violating the provisions of either of the two preceding sections," that is *inter alia*.

If in the act of conspiring together, or
If in the act of going in disguise upon a public highway, or
If in the act of going in disguise upon the premises of another,

With intent to injure, threaten, oppress or intimidate any citizen in the exercise of a "Federal right."

"Any other felony or misdemeanor be committed, the offender shall be punished for the same, etc."

Now, Congress has undertaken to punish every felony or misdemeanor which may be committed while the offender with the intent aforesaid is

Conspiring with another, or
Prosecuting such conspiracy, or
Is in disguise on a highway, or
Is in disguise on the premises of another; without any regard whatever to the relation between such felony or misdemeanor, and the intent to oppress, etc., a citizen of the United States. For the Statute reads "If *in the act* of violating any of the provisions of either of the two preceding sections, etc." This necessarily implies a physical, and not a causal relation.

By this Statute his every act is conclusively chargeable to an intent which in fact may be wholly foreign thereto. We may conceive of a case where an act might be wholly repugnant to and subversive of that intent, yet come within the punishment prescribed by Congress. One of two conspirators in disguise may be hurrying along a highway to the appointed rendezvous, with no thought in his mind but to meet and carry out a plan to injure and oppress a citizen in the exercise of a Federal Right, yet he may meet an ancient enemy, a rival in a love affair, and delay his haste for a revenge which has driven his first purpose from his mind, yet he is between his starting and his objective point; is in the act of going in disguise upon a highway; with the intent prohibited, and the assault which delays him, may be punished under this Statute.

But it may be said that Congress had no such acts in view. Answer, we can only read what Congress says, or in the language of Mr. Justice Field in United States v. Fox 95 U. S. at page 697.

"It is quite possible that the framers of the Statute intended it to apply only to acts committed in contemplation of Bankruptcy, *but it does not say so*, and we can not supply qualifications which the Legislature has failed to express."

This may be paraphrased:

It is quite possible that the framers of Sec. 5509 intended it to apply only to other felonies or misdemeanors committed pursuant to and in furtherance of the purpose of the acts or agreement violating Sec. 5507 and 5508, but it does not say so, and we can not apply qualifications which Congress has failed to express.

But it may be argued that when Congress says "If in the act of violating" it meant, "If with the intent of violating any of the provisions of either of the two preceding sections, any other felony, etc., is committed." We reply that we can not so far strain the language of a Statute as to construe the word "act" to

mean "purpose." The act and the purpose are too clearly different to permit such an interchange of meaning.

Therefore, Congress has clearly undertaken to prohibit acts beyond its power to prohibit, and we have no warrant for assuming that it intended something else wholly at variance with what its language imports, merely because that something else falls within its power to prohibit.

Then as to the contention that Congress intended to create no new offense, but merely to define a punishment for the various overt acts which might be committed pursuant to a conspiracy. We answer that 5509 applies alike to 5507 and 5508, that not all of the provisions of 5507 and 5508 are predicated upon a conspiracy, and hence not all acts punishable under 5509 can be overt acts. In fact Sec. 5507 prohibits acts of single individuals. Sec 5509 is not susceptible of such separation. It must stand or fall as it is written. This Court can not accord to Congress an intent which can only find expression by a separation of an inseparable phrase. Such an operation is as fatal an appendectemy as the separation of the Siamese twins.

Nor can it be said that 5509 merely provides a measure of punishment to be imposed where 5507 and 5508 are violated in a certain way. This is clear from the language of the Statute.

If any other felony be committed
The offender
Shall be punished for the same--
Now what is the predicate?

Some OTHER felony or misdemeanor. Under what law. By inference the State Law, but is this inference justified in seeking the operative effect of a criminal Statute.

Who shall be punished.

The offender, not the conspirators as such, (for the word offender is employed in the singular), but the individual who commits the felony or misdemeanor—

What shall he be punished for?

The same.

Not for violating 5507 and 5508, the punishment is otherwise provided, but he shall be punished for such felony or misdemeanor. This was the view of the learned trial Judge, for in his instruction to the jury he employed the following language:

"Therefore the second section (5509) means that if a felony or misdemeanor be committed by persons who have conspired with the intent stated in the first section (5508) in pursuance of or in carrying into effect the purpose of such conspiracy, the punishment *for the offense under the State law* shall be in this case governed by the law of Virginia."

"The punishment *for the offense under the State Law,*" not a part of the punishment for the conspiracy.

Not only has Congress provided the punishment for violations of 5507 and 5508, but it has enacted that the punishment shall in no case exceed a fine of $5,000.00 and imprisonment for ten years. Congress must have known that there are few felonies under State Laws, but what are punishable with longer terms of imprisonment than ten years, especially felonies such as would probably be committed in the premises. Then had Congress intended to provide a punishment for violations of 5507 and 5508 greater than ten years imprisonment, which punishment is in these sections specifically prohibited, it certainly would have framed 5509 as an exception to these specifically enacted limitations, and would not have enacted two flagrantly inconsistent Sections.

It can scarcely be contended that Congress in enacting Sec. 5509 intended the punishment therein prescribed to be applicable only as an increased punishment for such acts as would properly fall within the definition of "overt acts" pursuant to the conspiracy prohibited by Section 5508. The Statute would have to be entirely re-written by substituting the expressions

on the right for the expressions on the left in the following:

If in the act of violating any provions of Secs. 5507 or 5508.	If in the act of violating that provision of Sec. 5508 prohibiting a conspiracy
Any other felony or misdemeanor	Any other felony or misdemeanor which tends to effectuate the object and purpose of said conspiracy
Be committed	Be committed
The offender	The offender as well as each of his co-conspirators
Shall	Shall in addition to the punishment prescribed in Sec. 5508
Be punished	Be punished
For the same.	For said conspiracy.

with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed."

Such a re-writing operates not only to diminish the scope of the Statute from "any provision in Sections 5507 and 5508" to "one of the provisions in Sec. 5508" and also to enlarge the class of persons to be punished from "the offender" to "the offendor and each of his co-conspirators" but has the further effect of looking to a separate sentence in a preceding section in search for an antecedent for a relative pronoun.

Therefore 5509 must be construed as making it a new and separate offense against the United States to commit any felony or misdemeanor while in the act of violating any of the provisions of 5507 and 5508, and this regardless of whether such felony or misdemeanor operated in any wise to violate or invade the sovereignty of the United States, and alike regardless of whether it was committed with an intent or purpose

which Congress could, under the Constitution control or punish.

But assuming that this strained construction can be justified, and that Congress intended to add a new and further punishment for the conspiracy where a felony was committed pursuant thereto and to determine that additional punishment by the State Law, we come to the question.

Has the Government the power to punish both the intent and the act? Both the conspiracy and the "other felony?"

That the mental process or intent alone is the real punishable feature of a conspiracy is beyond dispute. The mere agreement is the body of the offense, and no overt act is necessary to make it punishable.

Now, under the Common Law, a conspiracy followed by an overt act was merged into the latter. This for reasons of humanity. Much more so must this be true under American Constitutions which forbid double jeopardy.

Even the authority of the State, which extends both to the conspiracy and to the unlawful (overt) act independently of the conspiracy, could not punish both.

The (overt) act is in law predicated upon a certain intent (that is where the intent is presumed from the act). When the act is punished, the intent is punished, for the act without the intent is not punishable. Therefore the one punishment having been imposed, which but for the wrongful intent could not have been imposed, it follows that in punishing the act, the intent has been once punished, and since a conspiracy is but a mutual agreement to give effect to an intent, it likewise follows that to punish the conspiracy as well as the act, would be to again punish the intent.

There may of course be overt acts connected with a conspiracy, and yet actuated by a motive wholly foreign to, but more malevolent than that which induced the conspiracy. Here the two should be merged upon the principle of the Common Law. But under this act

of Congress the United States can not punish the act, *unless it be the fruit of a specific intent*, which intent is the very body of the conspiracy. If the act be committed with other intent, or purpose, it is beyond the power of Congress to punish.

If committed with the same intent which induced the conspiracy, then Congress is undertaking to punish separately the two necessarily concurring component parts of one crime. The intent is one crime, the act plus the intent is the other crime. The second must necessarily include the first.

How then can Congress punish both the conspiracy, which is nothing more than the mutual intent, and again punish that intent as a necessarily component part of the other felony. Necessary before Congress can punish it at all. *The only part thereof which Congress can punish.*

It is admitted in the instructions given by the learned trial judge that the Federal Court could not try the murder, except under an indictment charging the conspiracy also. It is admittedly necessary to aver and prove the conspiracy in order to punish the murder, yet it is contended that the conspiracy may be again punished after the murder plus the conspiracy is punished.

If Congress can have the power to punish the murder, it is because that murder is done with the intent to intimidate, oppress, threaten, and injure, because of the exercise of a Federal Right, which for brevity may be termed "the conspirital intent." Without that intent it can not punish the murder. It is only the murder plus the conspirital intent which it can punish. Having punished the conspirital intent separately, it can not again punish any crime in which it is an essential element.

So we reach the conclusion

1st. That Congress had no power to enact 5509 as merely defining a new punishment for violation of 5507 and 5508 under certain circumstances.

2nd. That even though Congress had that power, such a construction of the Statute would do violence to its every phrase.

Therefore that Section 5509 is expressive of an effort on the part of Congress to create a new and distinct offense.

This being so, it must follow either:

That Congress has undertaken to prohibit acts regardless of whether they invade the Sovereignty of the Federal Government, and the Section is therefore void, or else that the Section must be construed as making a new offense of any felony or misdemeanor committed pursuant to a prohibited conspiracy, and in an effort to carry out its objects and purposes.

Now, the first would be clearly unconstitutional, therefore any indictment under 5509 must be predicated upon construing that Section as making a new offense of any misdemeanor or felony committed pursuant to a prohibited conspiracy and in an effort to carry out and effectuate the purpose with which that conspiracy was formed.

We respectfully and earnestly submit that to construe the section in this way is to insert therein a qualification which Congress has failed to express. That under the authority of Fox v. United States supra, the Courts are without power to supply such an omission, and that therefore Section 5509 is under any view beyond the power to Congress to enact and any indictment predicated thereon is invalid.

However, should the Court in order to uphold the validity of the Statute, give it the only construction which comes within the Constitutional power of Congress, to-wit, creating a new offense of any felony or misdemeanor committed pursuant to a conspiracy prohibited by Section 5508, then we return to the question which confronted the prosecuting officer when he drew this indictment, and find that he had concluded that paper as follows:

"And so the grand jurors aforesaid, on their oaths

aforesaid, do say that the said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors unknown, did commit the crime of conspiracy in manner and form aforesaid, and for the objects aforesaid, and that while in the act of so combining, conspiring, confederating, and agreeing together and among themselves as aforesaid, and for the purpose aforesaid, they, the said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors unknown, did unlawfully, feloniously, and wilfully, and of their malice aforethought, commit the crime of wilful, deliberate, and premeditated murder, which is a felony under the laws of the State of Virginia, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States."

Now, this must be either one of three things: Either an effort

1st. To punish the conspiracy with a double penalty, to-wit, that prescribed by the United States for a conspiracy, and that prescribed by the State for murder, which we have seen is not justified under the Statute, or else

2nd. To punish the conspiracy as one offense and the murder as another offense, yet the conspiracy being confessedly a necessary part of the murder before it is punishable by Congress. This is likewise a double punishment. And further the indictment is bad for charging the two crimes in one count, or else,

In the United States vs. Cadwallader, 59 Fed. p. 679, the Court says: "It has been considered greatly prejudicial to the defense of a prisoner to be put upon trial at the same for two distinct crimes, of a high grade, such as murder, manslaughter, rape, arson, burglary, grand larceny, or embezzlement, which would prejudice the prisoner in his defense, and lead to much confusion, if not injustice." Such has been the general rule of criminal pleadings by the Common Law,

however, in England, and presumably in most of the States have relaxed the rule by allowing in misdemeanors and purely statutory offenses two or more distinct offenses to be united in the same indictment, and putting the defendant on trial for all at once. I do not know of any case, however, where the prosecution has been allowed to unite two or more distinct offenses in the same count of an indictment; and such a thing, if allowed, must necessarily lead to much confusion and embarrassment. How is the defendant to plead, and how are the jury to find their verdict? There is no precedent or practice for allowing a prisoner to plead guilty to one portion of a count, and not guilty to another, or for the jury to find the defendant guilty under one part, and not guilty under another part."

In the case at bar the defendant might have been guilty of the murder, and yet not amenable to punishment by the Federal Government, unless he was also guilty of the conspiracy. Yet, it was impossible for him if such were the case, to raise this issue by the pleadings.

The Court instructed the jury to return a double verdict upon each of the two counts in the indictment, or upon either of them, to-wit, guilty or not guilty of the murder, and guilty or not guilty of the conspiracy. In the language of the case cited above, there is no precedent or practice to justify this course.

To the same effect is the United States vs. Kelsey 42 Fed. p. 889, where the Court says: "The indictment purports to charge two distinct offenses which should be set out in separate counts. And it therefore may be obnoxious to the objection of duplicity, which is defined to be 'the joinder of two or more distinct offenses of one count. The criminal law never permits this.' First Bishops Criminal Procedure, Sec. 432."

3rd. To punish the murder alone the conspiracy being charged merely to give the Federal Court jurisdiction of the murder. Under this view, the indict-

both in England, and in this Country. The Statutes, ment is defective, for it concludes with the charge "that the conspirators did commit the crime of conspiracy" and did feloniously commit the crime of murder."

The first was not the view taken by the Government and the Court, for the Court instructed the jury to fix the punishment for the murder, which was by the jury fixed at fifteen years imprisonment, whereupon the Court fixed the punishment for the conspiracy at one day imprisonment and a fine of $100.00. The judgment of the Court being one single judgment as for one offense.

So it is respectfully submitted that the demurrer should have been sustained, since under a proper construction of the Statute if it is at all valid, but one crime was punishable and the indictment has charged two crimes which required two seperate findings of the jury as a response thereto.

The indictment was further defective in that the crime sought to be punished should have been charged as committed with the same purpose with which the conspiracy was charged to have been formed. This was not done.

Now before the Federal Court can acquire jurisdiction of the murder, it must have been done pursuant to the conspiracy, and with the intent prohibited. Not only must the murder have been done with this intent, but the indictment must so charge. Now let us see whether this has been done—

The conspiracy is charged to have been formed with intent to injure, oppress, threaten, and intimidate one Peter Hall BECAUSE HE WAS AN INFORMER.	The murder is charged to have been committed with intent to threaten, BEAT, injure, intimidate, and KILL Peter Hall without assigning any motive whatever.

It is nowhere charged that the intent to beat and kill Peter Hall was because he was an informer. The

indictment is absolutely silent as to what induced this intent to *beat* and *kill*. It might have been because of other grudges or ill feeling. Certainly the indictment does not say it was not so—does not aver the jurisdictional requisite of any act done with intent to *beat* and *kill* Peter Hall.

A conspiracy is defined by this Court in numerous decisions to be either an agreement to do an unlawful act, or an agreement to do an act in itself lawful, but in an unlawful manner. Pettibone v. U. S. 148 U. S. 205.

Now, Section 5508 adopts into the Federal Criminal Law a certain conspiracy which but for this Statute would not be punishable by the United States. Three things must therefore concur, to-wit:

The agreement—

The agreement to threaten, injure—

The agreement to injure, etc., because of the exercise of some Federal Right.

Now, it is nowhere prohibited by Congress that one single individual shall threaten, injure, oppress, or intimidate such citizen because of his exercising or having exercised his Federal Right. It is only prohibited that two or more shall conspire to do so.

Therefore the act agreed upon must have been *agreed* to be accomplished by the exercise of unlawful means.

The indictment does not allege any unlawful means AGREED to be employed. Admitting for this argument that it charges that unlawful means were employed—it nowhere charges that such unlawful means were AGREED upon. The defect in charging the conspiracy is not cured by the charge of overt acts. United States v. Britton 108 U. S. 199–205.

"If the indictment does not set forth the object specifically, and show that such object is a legal crime, it should state the particular means TO BE used by the conspirators and show these means are criminal."

People v. Mather (N. Y.) 21 Am. Dec. 150, Lamberts Case 9 Con. 578.

Therefore when the indictment concluded as hereinbefore set out with a general charge of conspiracy and murder and against the peace and dignity of the United States, and nowhere having properly charged the jurisdictional elements, this was merely charging a conclusion of law which is bad under any system of pleading cognizable by the Federal Courts.

THIRD.

THE ADMISSION AND EXCLUSION OF EVIDENCE.

Assignment of Error 12, Record 188. The contention of the Government was that the several defendants had conspired together to intimidate Peter Hall, because he had informed the United States that Beamer and the Rakes had violated the Internal Revenue Law. This was the motive charged, and it was necessary to prove this particular motive before the Government could punish the offense. It had been shown that the plaintiff in error had been arrested for illicit distilling, and acquitted thereof, and there was evidence of no other connection on his part with any illicit distillery, except such as tended to support this charge. The evidence not having shown sufficient cause to hold him upon that charge, the Government sought to establish the ill will against Hall, because he was an informer, by showing that there were numerous distilleries upon the land of C. P. Nolen, a brother-in-law of Rakes. Therefore Peter Hall was permitted to state "I don't think there is a branch on his (C. P. Nolen's) land any where that a distillery could be put up, but that there has been one." This was irrelevant to the issue. It was not shown that Rakes had participated in the operations of these distilleries, was in the neighborhood when they were operated, or even knew of their exist-

ence, nor that Nolen had knowledge of their existence on his own land, yet its effect was to lead the jury to believe that being a brother-in-law of Nolen, and there being at various times, distilleries upon Nolen's land, therefore Rakes was an ancient enemy of all informers.

There was no charge that Bill Turner or his son Charlie Turner was connected with or in any wise involved in this offense, nor was there any evidence tending to show this. The only evidence tending to connect either with the offense, was the statement of Elizabeth Hall that Charlie Turner was with the party that came to her house about six hours before the murder. Yet (Assignment No. 13, Record 188, Bill of Exceptions No. 3, Record 170-1) Alexander Rakes was permitted to state that he had a conversation with Bill Turner, in the city of Lynchburg during this trial, and that said Turner had said, "I had better be careful, that if one side did not get me, the other would."

The object of this was to induce the jury to infer that friends of the defendant were trying to intimidate Government's witness. Such, if it had occurred, should in no wise prejudice the defendant. Otherwise an innocent man might be the victim of overzealousness on the part of impulsive friends.

The same witness was permitted to state, (Bill of Exceptions No. 3, Record 171) that he had a conversation with defendant Rakes, in which Rakes is claimed to have said that Peter Hall had reported his still and damaged him forty dollars. The defendant had asked that the time and place be designated. This was important for two purposes:

First. In order to obtain information upon which to contradict the witness, and

Second. To show whether the conversation was had before or after Peter Hall had informed against Will Rakes. If before such information was given, it went directly to the relevancy of the evidence as well as to its weight. But the Court refused to require the

witness to specify the time and place, which was prejudicial error.

It had been shown that Beamer, one of the co-defendants, was the owner of a "Buckeye Gun," and that there were a large number of such guns owned in the vicinity of the murder. That the gun owned by the defendant Rakes was entirely different being what is known as a pump or repeating gun. Yet, the Government exhibited to the jury a Buckeye Gun, and evidence was offered that this was the same kind of a gun as that owned by Beamer. It was not attempted to show that the gun exhibited was the gun owned by Beamer, nor did the Government attempt to explain the source from which the gun came into the possession of the Government. So far as the evidence shows or suggests, the gun might have been purchased at a hardware store in Lynchburg for the purpose of exhibition.

The witness was asked (Record 132) as follows:

Q. I forgot to ask you about Grover Beamer's gun. What kind of a gun did he own last Spring, at the time of this killing?

A. He owned a Sixteen.

Q. What make was it?

A. It was a Buckeye.

Q. You remember the gun that you testified to here on the other trial, don't you?

A. Yes.

Q. Did you identify that gun as his?

A. It looked like one I had seen him with.

Defendant objected as the gun had not been identified, objection was overruled.

Q. I now show you the Sixteen guage Buckeye Gun that you have heretofore referred to in your evidence, and say whether or not that appears to be the gun that belonged to Grover Beamer?

A. It looks like the gun I seen him with.

The Government then offered the gun as an exhibit, and it was admitted over objection.

The Government had not sought to show how it obtained possession of the gun, but only that it was the same brand of gun that Beamer had owned.

There is serious objection to the admission of weapons in evidence upon a charge of homicide. Stated in Wigmore on Evidence, Vol. 2, Sec. 1157, p. 1354, as follows: "The objection thus indicated seems to be two-fold. First, there is a natural tendency to infer from the mere production of any material object, and without further evidence, the truth of all that is predicated of it. Secondly, the sight of deadly weapons, or of cruel injuries, tends to overwhelm reason and to associate the accused with the atrocity without sufficient evidence. The objection in its first phase may be at least partly overcome by requiring the object to be *properly authenticated*, before or after production; and this requirement is *constantly enforced* by the Courts."

And in Sec. 2130, Vol. 3, p. 2889, says: "The necessity of authentication, therefore, applies equally well to a knife, a horse, a coat, or a machine, as to a letter or other writing whenever it is asserted to be connected with a person."

The illustration is a forceful one as applied to the circumstances of this case. Had Beamer, instead of Rakes, been upon trial, it would have been as necessary to identify the gun as his gun, as it would have been to identify a letter as written by him. Nor would it have sufficed to show that there was a similarity, for such evidence is as consistent with a want of identity as it is with identity, being purely negative in character. But upon the trial of Rakes even a letter properly identified as written by Beamer, would not have been evidence, unless shown to have been an utterance during the life of the conspiracy.

No attempt was made to show similarity between this gun, and one owned by Beamer after the formation of the alleged conspiracy. Only that he owned a similar gun in the Spring. It is not even claimed that

Beamer had a gun on the night of the alleged murder. Sam Hall says he did not see Beamer have any gun at Elizabeth Hall's. Jane Hall says (Record p. 113) emphatically that he did not have a gun. So the Government was permitted to prejudice defendant Rakes by exhibiting a gun merely of the same make as Beamer had some time in the Spring prior to the killing.

16th Assignment of Error.

The defendant Rakes offered to introduce his wife to prove his whereabouts on the night of the alleged murder. This was denied him.

Whatever the rules of evidence in the Federal Court as to the competency of such a witness, the defendant was on trial for a murder under the laws of Virginia, and under any view of the case, he was being tried as to whether he should be punished as the laws of Virginia would punish him, and in Virginia a wife is a competent witness in favor of her husband.

The Court adopted the view approved in Motes case, 178 United States, p. 458, that upon such a trial the measure of punishment should be determined in the manner prescribed by the laws of Virginia, to-wit, by the jury. If defendant was to be proven guilty of a crime under the laws of Virginia; if it was incumbent on the Government to establish that he had committed a felony under the laws of Virginia, and that the measure of punishment should be ascertained as under the laws of Virginia, it would seem clear that the defendant should have the benefit of the laws of Virginia in making his defense.

The issue was whether he had committed a felony under the laws of Virginia, and how that felony should be punished under the laws of Virginia. Surely the laws of Virginia as to what constituted a felony would control. Surely the laws of Virginia as to what evidence was sufficient to establish a felony in the Virginia Courts would control, and likewise it would seem equally clear that the defendant should be accorded

the same measure and privilege of defense as he would be accorded under the laws of Virginia.

17th Assignment of Error.

As it has been repeatedly said, the controling issue in this case (if we admit that the murder was committed pursuant to a conspiracy, to which the defendant Rakes was a party) was whether the said conspiracy was formed with the "Federal Motive." That is whether or not the conspirators were actuated by the fact that Peter Hall was an informer. If there was a reasonable doubt as to whether the conspirators were actuated by this or some other motive, the defendant was entitled to an acquittal.

He offered to show by J. J. Brammer and other witnesses (Bill of Exceptions No. 5, Record 172) that Peter Hall was a notorious and offensive character in the community, a general trespasser, a petit thief, as well as a reckless character; that the better people there were afraid to leave their homes unprotected because of him, and that he had made threats against parties other than the defendants, that he would destroy their property, and that such parties took precaution to prevent such destruction. That the witness was employed by a brother-in-law and near neighbor of the defendant to watch his barn and look out for Peter Hall who had made threats against him. But this was excluded.

The Court ruled that any threats against either of the co-defendants could be proven, but neither the general character of Peter Hall, nor threats made against the brother-in-law of defendant Rakes could be proven. The Government had repeatedly drawn out statements concerning the brother-in-law of Rakes, notably assignment of error No. 12 concerning distilleries on the land of his brother-in-law. Yet this was not considered sufficiently close a relationship to justify an attempt to prove ill feeling other than that growing out of Peter Hall's having acted as an informer. But the ruling is otherwise erroneous. If the motive which

controlled the conspirators was not the "Federal Motive," or if there was a reasonable doubt between two motives as to which controlled the conspirators, the defendant should have been acquitted.

If the conduct of the defendant was reconcilable to any reasonable hypothesis consistent with any other motive than the alleged motive, he was entitled to an acquittal. Yet he was not permitted to prove that there were other people in the community who had a motive other than a Federal Motive for injuring Peter Hall, or that either of the defendants could have entertained motives which would justify their acquittal.

The Court offered to admit evidence upon conditions that tended to show that the defendants committed the murder from some other than a Federal Motive. In other words, that the evidence was admissable only as upon a plea of a confession of the murder avoided by the contention that it was not committed with a "Federal Motive." Requiring the defendant practically to admit the murder before evidence consistent with his innocence before the Federal Court could be admitted.

We submit respectfully that under the strictest rules of the Common Law this was error. We are taught Lord Erskine (24 Howells State Trial 966) that the principles of evidence "Are founded in the charities of religion in the philosophy of nature—in the truths of history—and in the experience of common life."

While it is true that the rules of evidence in the Federal Court are the rules under the Common Law as it was in 1789, yet it is believed that no Federal Court has ever refused to follow in the wake of the later and the broader thought construing those rules according to the principles recognized at that period, but applying them to modern conditions and a more liberal theory of the philosophy of the law. In other words, as they had advanced with the growing experience of common life. Therefore whatever was the

proper rule of evidence under the Common Law at that period, obtains now in the Federal Court, and in determining what that proper rule was, these Courts are not limited by the strict and narrow view which then obtained, but have been quick in their response to the development of the law.

There are few writers whose views on questions of evidence are more worthy of consideration than Mr. Wigmore.

The author says on page 200 in Secs. 139-140-141:

"The question that arises, from the point of view of the rules of evidence, is whether, in evidencing this doing by a third person as a fact of disproof, any unusual requirements should be made as to the strength of the evidence before it can be admitted. Thus, to prove A guilty of murder, evidence of his threats (i. e. a design) to commit it are always admissable (ante, §105); now, if the fact to be proved is that B committed the murder (as inconsistent with A's guilt), why should not B's threats be admitted, without further restriction, as A's are? It is true that evidence of B's threats alone would not go far towards proving B's commission; but it is not a question of absolute proof, nor even of strong probability, but only of raising a reasonable doubt as to A's commission; and for this purpose the slightest likelihood of B's commission may suffice, or at least assist. The evidence of B's threats, to be sure, may, in a given instance, be too slight to be worth considering; but it seems unsound as a general rule to hold that mere threats, or mere evidentiary facts, of any one other sort, are to be rejected if unaccompanied by additional facts pointing toward B as the doer. Nevertheless, most Courts have shown an inclination to make some such restriction, and to insist that two or more kinds of evidentiary facts pointing toward B must be offered, and that one kind alone will not be received. It is difficult to see the object of this restriction, because if the evidence is really of no

appreciable value, no harm is done in admitting it; while if it is in truth calculated to cause the jury to doubt, the Court should not attempt to decide for the jury that this doubt is purely speculative and fantastic, but should afford the accused every opportunity to create that doubt. A contrary rule is cruel to a really innocent accused."

"SAME: THREATS BY A THIRD PERSON. Threats are perhaps the commonest kind of evidence offered for this purpose. The rulings differ widely in their effect; but in general a wholly unnecessary strictness is shown, and the illiberal attitude of some Courts in this respect toward accused persons is in singular contrast with the maudlin tenderness otherwise often exhibited."

"SAME: MOTIVE OF A THIRD PERSON. A motive as evidence is perhaps not of such value as a threat; yet Courts seem more inclined to receive it. There is no reason for requiring that it be coupled with other evidence in order to be admissible."

FOURTH.

THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT A VERDICT.

There are three essential elements of the crime charged, each of which must have been proven beyond a reasonable doubt; these are:

1st. That the defendant either committed the murder or was a principal thereto in the first degree,

2nd. That there was a conspiracy with which the murder was so intimately connected as to charge all of the conspirators therewith, and

3rd. That the controlling reason for the formation and execution of the conspiracy was that Peter Hall was an informer.

We might admit that the defendant actually committed the murder, or that he was a principal thereto in the first degree, without justifying a verdict of guilty in

this case. We might go further and admit that he was a conspirator, and that the murder was committed pursuant to the conspiracy, and still this would not justify a verdict of guilty.

If we take issue upon the reasons which actuated the conspiracy, and can show that the evidence upon this point was insufficient, we have established as a matter of law that the verdict and the judgment thereon are improper. Much might be said as to the sufficiency and reliability of the evidence that the defendant participated in the assault. More might be said as to whether there is any evidence that the assault was committed pursuant to a conspiracy, but it is sufficient for the purpose of this assignment of error if we can establish that as a matter of law there is not sufficient evidence of a conspiracy formed pursuant to the "Federal Motive."

We do not ask this Court to weigh the facts and say whether or not it would find a similar verdict upon such facts. This we understand to be beyond the assignment of error, but we do ask this Court to say that the facts are wholly insufficient to justify a verdict and that the trial Court erred in not sustaining the motion of the defendant at the conclusion of the Government's case to direct a verdict of not guilty, which motion was renewed at the conclusion of the entire evidence.

If we examine the record from a point of view of a demurrant to the evidence, we find the following facts to be established:

That Peter Hall was first an informer in December, 1906, (Record p. 59). That prior thereto he had been repeatedly arrested upon warrants sworn out by the defendant and his relatives for numerous petty annoyances and upon like warrants sworn out by many other citizens of the community, (Record pp. 59-60). That he had given information that the defendant Rakes was operating an illegal distillery, but that said Rakes had never been arrested upon the charge, nor

any warrant sworn out against him when the murder was committed, and when the warrant was subsequently sworn out, he was discharged because there was not sufficient evidence. (Record p. 71). That Peter Hall had given information against the defendant Beamer but that no warrant was ever sworn out thereon, and no action was ever taken. That no threats were ever made by either of the defendants against Peter Hall, except that J. W. Staples says on page 89 of the record, that the defendant Rakes said to him two weeks before the murder, speaking of Peter Hall, "You all let him report his own distilleries, it seems like; God damn him, he ought to be killed," which was the day after the Grover Beamer distillery had been seized.

There were five parties charged as participating in the conspiracy, four of these are proven to have been together for several hours the day of the killing, but their conduct at such gathering where other parties were present, in no wise suggested that it was the conduct of conspirators. (Record pp. 92-93).

Of these four only two are seen about eight o'clock at night searching for Peter Hall. These two were Will and Peach Rakes, and they were accompanied by Beamer and Turner, neither of whom were with them at any time earlier during the day, so that the personal composing the first searching party is made up of two of those who were in conference in the morning, and two who had not been with them before. Of these four only Will Rakes and Beamer have ever been connected with illicit distilling. When the party is next seen at the scene of murder it is composed of Will and Peach Rakes, Beamer, and Booth and Martin. Turner has disappeared and Booth and Martin, who were in conference with the others during the morning, and concerning whom the Government has not attempted to show any connection with illicit distilling, have taken Turner's place. So the party together in the morning is composed of one illicit distiller and three who are

innocent of that occupation. When next seen it is composed of two illicit distillers and two who are innocent of that occupation, and when next seen one of the innocents has disappeared, and two other innocents have taken his place.

It is consistent with the evidence that the defendant Rakes was indignant at Peter Hall because he was an informer, and was likewise indignant at him because he was a common nuisance in the neighborhood; that his three associates in the morning had no personal grudge against him because he was an informer, but might reasonably have had because he was a common nuisance. It is earnestly submitted that whatever course of conduct was determined upon in the morning is as reasonably attributable to the conduct of Peter Hall as a common nuisance as it was to his conduct as an informer.

Assuming then that the evidence points with equal probability to the two different motives which actuated any plan which might have been then agreed upon, although there is no evidence or suggestion that any plan was then formed, we next find the party composed of two who might have had ill will against Peter Hall because he was an informer, and two who had no reason to have such ill will, and it seems clear that their conduct when they are seen for the second time that day, to-wit, at eight o'clock that night, is inconsistent with that of conspirators with a "Federal Motive," and is wholly consistent with that of citizens who were ill disposed to Peter Hall because he was a common nuisance. We say this because it is shown (Record p. 100) that Sam Hall had co-operated with and assisted Peter Hall in searching for illicit distilleries, which fact was known to at least one of the four parties together at eight o'clock, (Record p. 105). Yet Sam Hall is seen while they are in search for Peter Hall, and no violence whatever is offered to him, and he is left unmolested. It would seem if (in the language of the District Court) the parties were at eight

o'clock actuated "mainly and chiefly because Peter Hall was an informer," and knowing that Sam Hall was likewise an informer, they would not have permitted one of these informers to remain unmolested, and go in search of the other.

When seen at the scene of murder only two of them can have the Federal Motive, and yet all five of them might have a different motive, and it became the duty of the jury to attribute to the defendant any motive which from the evidence might be reasonably consistent with the absence of the "Federal Motive."

If the Court can say from the whole evidence that the one motive is as consistent with the evidence as the other, then the jury have plainly disregarded the instructions of the Court, and the verdict is erroneous and unjustified.

We have carefully read and re-read the record for the search of any fact suggesting that the "Federal Motive" was even more probably in the minds of W. E. Rakes and Beamer, but have found nothing, except what is pointed out heretofore.

There is not the slightest suggestion that Booth or Martin ever entertained the Federal Motive, and Peach Rakes is connected with such motive only by suggestion (Record p. 105). Can it be said that the jury *could* have found that the "Federal Motive" was shown beyond a reasonable doubt, and to the exclusion of every other actuating motive, when three of the participants are unconnected with that motive, when two of them are no more strongly connected therewith than with some other motive, and when the conduct of those two, five hours previous emphatically negatived the "Federal Motive" in that the other informer remained unmolested.

It is not the motive for the killing which gives jurisdiction to the Federal Court, nor is it the motive which induced any one of the defendants to join the conspiracy, but it is the motive *of the conspiracy*, a motive which induced the conspiracy. The CON-

SPIRACY must have been formed BECAUSE of the exercise of the Federal Right. If the conspiracy was formed BECAUSE of some OTHER MOTIVE, there was no violation of 5508, and no jurisdiction in the Federal Court.

It is by no means difficult to see that a jury to whom had been exhibited evidence of what seemed an atrocious murder of an aged woman by five armed men, should have lost sight of the remote question of the motive which actuated the conspiracy, and have looked only to the motive which actuated the defendant, or to the moral turpitude of the defendant. If all of the other proceedings in this trial were without error, if it is proper for the Federal Government to undertake to punish this crime and to couple it with a conspiracy in one indictment, and thus assume jurisdiction thereof, this Court will not be slow to see and to view with the most serious consideration the dangers which attach to arraigning the defendant upon the charge of an atrocious crime, and submitting to a jury the question of his guilt or innocence, the correctness of which hangs upon the slight thread of a conspiracy, and where they are almost sure to be led astray by a failure to understand the narrow limits of their authority. The guilt or innocence of the defendant upon the charge of murder and the righteousness of some punishment to be visited upon them is not here involved. This, as was said by the Judge of the trial Court, does not bar the State in its prosecution for the murder, and it is a great deal more than a probability that the jury having lost sight of the slender thread of the conspiracy in contemplating the horrors of murder, have undertaken to impose upon this defendant a punishment which is reserved for another jurisdiction, and which after an acquittal in this Court or a satisfaction of its judgment, might yet be visited upon him by the State authorities.

For the purposes of the foregoing we have admitted the murder and the conspiracy. We will say noth-

ing, although much might be said, upon the evidence as to the murder. We have admitted the conspiracy likewise for the purpose of this argument, but we suggest to the Court that the evidence as to a conspiracy is as slight and as slender as is the evidence of the "Federal Motive," actuating the conspiracy.

The department of justice which through its able counsel will answer this brief, are requested to point out to the Court anything omitted herefrom and found in the record, which tends to fasten upon the defendant the conspiracy or the Federal Motive. In the absence of such a showing, and the Court upon its own investigation, failing to find further evidence, it is most respectfully and most earnestly submitted that as a question of law the record does and must disclose that the jury have failed in their duty to attribute to the act of murder, if murder it was, a motive consistent with the innocence of the defendants *coad* this prosecution, which is more easily reconciled to the evidence than one consistent with his guilt.

As to the grade of the offense ascertained by the verdict, we will only say that the evidence shows that the shots were fired at random, six out of seven of them having been fired into the door and into the side of the house, and the eighth through and shattering the glass panes of a window and all of them of the smallest bird shot, wholly failing to suggest any feloneous intent upon the part of the defendants, if all of the motives predicated upon the conduct were admitted to be proven.

FIFTH.

THE INSTRUCTION.

We have attempted to show that there may be three views as to the meaning of Section 5509.

First. To punish the conspiracy with a double penalty, to-wit, that prescribed by the United States for a conspiracy, and that prescribed by the State for a murder.

Second. To punish the conspiracy as one offense and the murder as another offense, and

Third. To punish the murder alone, the conspiracy being charged merely to give the Federal Court jurisdiction of the murder.

We have likewise endeavored to show that if the first view of the Statute prevails, it is clearly unconstitutional as imposing a double penalty, and therefore if the instructions given by the Court are predicated upon this view of the Statute, they are necessarily erroneous. We will for convenience hereafter term this the "double punishment" view.

If the second view, which for convenience, we will designate the "double crime" view of the Statute prevails, instructions predicated thereon are likewise invalid, for they put the prisoner on trial in one count in one indictment for two separate and distinct offenses.

If the third view of the Statute is correct, and it is held to be valid under the rulings of the United States v Fox *Supra* the instruction should be predicated upon the theory of a single offense, otherwise the instructions are erroneous. For convenience we will designate this view of the Statute as the "single crime" view.

We will therefore undertake to present to the Court the several instructions given to the jury as well as the instructions refused, and to point out upon which view of the Statute they are predicated.

On page 179, Clause 1, the Court instructs the Jury as follows:

"Therefore the second section (5509) means that if a felony or misdemeanor be committed by persons who have conspired with the intent stated in the first section in pursuance of or in carrying into effect the purpose of such conspiracy, the punishment *for the offense under the State Law shall be in this case* governed by the law of Virginia."

This is clearly predicated upon either the double punishment or the double crime view of the Statute,

and was therefore improper. It either means that the punishment therein referred to was for one of the two crimes charged, or for one of two parts of the same crime. It is clearly inconsistent with the "single crime" view.

Clause four of the instructions given (Record 179) is a charge in general terms to the effect that the jury should judge from the character, appearance and intelligence of the witness, their worth of credit, and refused instruction No. 16, asked for by the defendant.

"That where it has been clearly proven to the satisfaction of the jury that a witness is not to be believed on oath, no statement of such witness, standing alone, and of itself is sufficient to prove any material facts beyond a reasonable doubt."

The only evidence showing the presence of either of the defendants at the scence of the murder, was the testimony of Jane Hall. It was shown by the evidence of eight witnesses, citizens of high character, among them a minister of the Gospel, and two officials of the County of Patrick, and four of whom had been called by the Gevornment as its witnesses, that Jane Hall was not to be believed upon oath. The defendant had the right to contend that this evidence was clear and to the satisfaction of the jury, and it would seem beyond dispute that the uncorroborated evidence of such a witness as successfully inpeached, is not sufficient to satisfy the mind beyond a reasonable doubt. Yet the defendant was deprived of the privilege of an instruction to the jury upon this point. The witness, Peter Hall, who was the sole witness testifying to other facts in the case, was as successfully impeached by the same witnesses and the instruction was applicable to him.

The defendant had asked for instruction No. 3, which was as follows: "The Court instructs the jury that the law presumes the defendant to be innocent; that such presumption follows through the whole course of the trial; that the evidence must show the guilt of

the defendant to the exclusion of every reasonable hypothesis of innocence consistent with the evidence. Therefore, in ascertaining the motive which actuated the alleged conspirators, you must attribute to them any motive consistent with their innocence, which can be reasonably reconciled with all the evidence. But if you find beyond reasonable doubt that the intent was that charged in the indictment, you may find the defendant guilty of conspiring with said intent, although another or other reasons for conspiring may also have actuated some or all of the persons indicted."

But the Court in lieu thereof gave its charge designated 5, (Record 180) which was as follows: "Before you can find the defendant guilty of conspiring as charged, you must believe beyond all reasonable doubt that there was a conspiracy formed by the defendant and some one or more of the other persons named in the indictment to injure, oppress, threaten, or intimidate Peter Hall because he had exercised the right of giving information of violations of the Federal internal-revenue laws.

"If you have a reasonable doubt as to the reason for the formation of the conspiracy charged in the indictment, you should acquit the defendant. However, the mere fact that some of the alleged conspirators may have been actuated by some motive not connected with 'informing' by Peter Hall, is not ground for acquittal, if you believe beyond a reasonable doubt that at least one of such other alleged conspirators and the defendant conspired to injure or intimidate said Hall, mainly and chiefly because said Hall had exercised his rights as an 'informer.'"

This ignored the theory of the defense which is undisputed law "that the evidence must show the guilt of the defendant to the exclusion of every reasonable hypothesis of innocence consistent with the evidence." This is not covered by the charge "If you have a reasonable doubt as to the reason for the formation of the conspiracy, you should acquit the defendant," when

followed by the qualification "If you believe beyond a reasonable doubt that at least one of such other alleged conspirators and the defendant conspired to injure, or intimidate said Hall, merely and chiefly because said Hall had exercised his rights as an informer." This delegated to the jury a most delicate process of differentiating between the various motives which may have actuated the defendants. It is perfectly true that the concurring presence of a lawful and an unlawful motive will not relieve a defendant from his criminal liability. If he was actuated by any unlawful motive, he is guilty. It was not for the jury to divide the motive. The law recognizes but one motive as the inducement to the act, and it was their duty to attribute to the defendants any motive reasonably consistent with their innocence.

The jury might well infer from this instruction that it was left to them to weigh the several possible motives in the balance, and to accord to the defendant that which might seem to them the main and chief motive, and such an instruction would seem to be misleading. It is earnestly contended by counsel for the defendant that there was not sufficient evidence of any "Federal Motive," and that instructions predicated thereon were improper, but this has been discussed under another heading, to-wit, the sufficiency of the evidence to support the verdict.

Section 6 of the Court's charge (Record 180) is to the effect that the defendant might be found guilty of the conspiracy and acquitted of the murder. This was in effect instructing the jury that the double crime interpretation of the Statute was correct. If the views heretofore expressed upon this point are considered as sound, the instruction was erroneous, because the only valid indictment which could be drawn under section 5509 was an indictment for murder, the conspiracy being charged for the purpose of jurisdiction. Instruction 7 is predicated upon the same view that it was for the jury to determine the guilt or innocence of

the defendant first upon the conspiracy, and second upon the murder.

Paragraph eight of the charge (Record 180) is predicated upon murder in the first degree. The evidence is that the shots were fired through a poplar door and through a window, probably with wanton recklessness, but there is not sufficient evidence to indicate a purpose to kill. The size of the shot, all of them being bird shot, negatives this intention, and it is clearly the law of Virginia that before there can be murder in the first degree "proof must be adduced to satisfy the mind that the death of the party slain was the ultimate result of a willful, deliberate and premeditated attempt shown." Jones' case v. Leigh 598, 611; McDaniel's case, 77 Va. 281; King's case Sec. Va. cases 78-84; Whitford's case, 6 Rand. 721; Hill's case Sec. Gratt. 594-595; Howell's case 26 Gratt. 995; Wright's case, 75 Va. 914, Mitchell's case 33 Gratt. 845; Wright's case, 33 Gratt. 880.

The party slain was Ann Hall. There is no evidence whatever indicating a purpose to kill Ann Hall, even though the purpose to kill Peter Hall were admitted and under the law of Virginia, this could not be murder in the first degree. It is perfectly true that under the Common Law a shot at A with an intent (expressed or implied) to kill A, but which resulted in the death of B is murder, but this in the absence of the distinction between murder in the first and murder in the second degree. In Virginia such a crime might be murder in the second degree, but not willful, deliberate and premeditated murder.

Nor can it be said that this error is not prejudicial for the reason that the jury acquitted the defendant of murder in the first degree. Courts can not profess to be ignorant of the fact that verdicts of twelve men are compromise verdicts, and it is within the range of probable certainty that where a defendant is found guilty of murder in the second degree and the punishment fixed within three years of the maximum, that some

members of the jury who were in favor of a higher, and some in favor of a lower punishment. Furthermore, to instruct the jury that they may under the evidence find a defendant guilty of a crime not shown by the evidence, is bound to prejudice the minds of the jury as to the enormity of the crime. It must clearly appear that the error was not prejudicial.

Seeking to secure a ruling from the Court upon its interpretation of the Statute, the defendant asks the Court to instruct the jury that he was upon trial for conspiracy alone, and that any offense charged committed pursuant to conspiracy was to be considered only in connection with the punishment for the conspiracy. If it is held that the Statute imposed two punishments for the conspiracy, it must be unconstitutional. If it is held that it imposed for the conspiracy one punishment composed of two parts, it was error to refuse the instruction. Therefore if this Court takes either of these two views of the Statute, the judgment must be reversed for prejudicial error.

The evidence was that all of the defendants except Grover Beamer, were in conference on the afternoon of the day of the killing, and it is the theory of the Government that the conspiracy was then formed. It is not attempted to show that more than one of these present at the time had any reason to know or believe that Peter Hall was an informer. Therefore if the conspiracy was then formed, and it was a motive common to any two of them, it must have been some other than a "Federal Motive." Later they were joined by Grover Beamer, and this inferentially after the conspiracy had been formed. It is as reasonable to suppose that Beamer's meeting with them was accidental as that it was pre-arranged,—the presumption will be that it was accidental. The motive which actuated him did not induce the conspiracy, and the defendant had a right to Instruction No. 7 (Record 175-6) to the effect that the defendant was not chargable with the motive which actuated Beamer in joining them, unless

the same was known to and acquiesced in by the plaintiff in error. This instruction was refused.

Paragraph 10 of charge (Record 181) emphasized paragraph 8, and is therefore erroneous.

Paragraph 11 (Record 181) of the Court's charge specifically directed the jury that if they found the defendant guilty of murder in the second degree, they should fix his punishment for *that offense.* This was clearly an adoption of the double crime view of the Statute, as the Court had just refused defendant's instruction 6 repudiating the double punishment or two part punishment theory.

Paragraphs 12 to 16 inclusive (Record 181-2) was as to the form of the verdict, which in effect instructs the jury to find separately the guilt or innocence of the defendant upon each of the two charges, to-wit, the conspiracy and the murder, which adopted the double crime view of the Statute.

Defendant's instruction 5 was that the jury should take into consideration all of the relations between Peter Hall and the defendants in ascertaining the motive, but the Court refused this instruction, and yet had charged the jury that they must determine the main and chief motive which actuated the attack upon Hall. They were charged to weigh between two possible motives, and yet were not instructed that they might consider facts which would bear upon the motive which was not punishable.

Instruction 9 asked for and refused was predicated upon the theory that the conspiracy was to run Peter Hall out of the country, and that the shot which killed Ann Hall, fired by one of the conspirators, departed from that purpose and without any encouragement from the accused, was not the act of the accused. This was consistent with one view of the evidence, and should have been given.

Instructions 10 and 11 were predicated upon the theory that the shot was fired with the intent to intimi-

date Peter Hall, but without intent to kill him, and that if fired pursuant to the mutual purpose, was but voluntary man-slaughter under the law of Virginia. Man-slaughter in Virginia is distinguishable from murder by the absence of malice, express or implied, the act having been intentionally done, but not intended to result in death. This was consistent with one theory of the evidence, to-wit, the reckless shooting without malice, yet the Court eliminated from the case the crime of voluntary man-slaughter, which under the laws of Virginia is punishable by imprisonment from one to five years.

Instruction 14 asked for is predicated upon the necessity that at least two of the conspirators were actuated by knowledge or belief that Peter Hall was an informer. This was refused, and the effect was that the verdict of the jury was in no wise based upon the consideration that such knowledge or belief actuated the conspiracy. It is almost inconceivable that two men should conspire to injure or kill another, because that other had done a specific act, unless they had knowledge or belief that such specific act had been committed.

The conspiracy alone gave jurisdiction to the Court, and instruction 15 was asked for to the effect that every essential element of conspiracy must be proven by clear, distinct and reliable evidence and beyond all reasonable doubt before any punishment can be imposed.

It is true the jury were instructed that a verdict of not guilty of the conspiracy would acquit the defendant, but they were no where instructed that every element of the crime of conspiracy must be proven by clear and distinct testimony. On the contrary, they could reasonably interpret the instruction to mean that the jury might find the defendant guilty of murder beyond all reasonable doubt, and if they believed that he was guilty of a conspiracy, then the verdict should so find.

SIXTH.

THE FORM OF THE VERDICT.

We have already discussed this under the heading of the demurrer to the indictment and the instructions of the Court. It is sufficient to say that the verdict has clearly and distinctly found the defendant guilty of two distinct and separate offenses under one count in one indictment, (for the two counts are practically the same) the punishment for one offense has been fixed by the jury and added to that has been a punishment ascertained by the Court for the other offense. There was but one issue joined and the verdict is not therefore responsive to the issue. If there was but one offense charged, the verdict is not responsive to the indictment. If there were two offenses charged, the indictment is bad not only for duplicity, but that it is predicated upon an invalid statute, and under any view of the statute, of the indictment, of the pleadings, or of the evidence, the verdict is improper in form and substance and is consistent only with the instructions of the Court.

SEVENTH.

THE JUDGMENT.

If all the other assignments of error were waived, it is respectfully submitted that the judgment should still be reversed because of its form. As we have undertaken heretofore to point out at great and tedious length, if the Statute undertakes to punish the crime of murder as such, it is invalid. If it is sought to attribute to it an interpretation that it undertakes to punish only such unlawful acts as are committed in an effort to effectuate the conspiracy, then this interpretation is based upon a straining of the language of the Statute and supplying a limitation upon its provision which Congress has not provided.

If it is construed as prohibiting such an offense, then it must be a separate and distinct offense, and the indictment can be upheld only upon the theory that it charges the murder pursuant to the conspiracy, and not the murder and the conspiracy.

If this view is taken the instructions of the Court were erroneous, the verdict was improper, and the judgment was void.

If it is construed to mean that it is a new and additional punishment provided for the conspiracy alone, then the instructions of the Court are improper and the verdict is bad in form, and the judgment is invalid.

If the murder alone is punished, the judgment has imposed a double punishment therefor and under the authority of ex parte Lange, 18 Wallace 163, the defendant has been deprived of its Constitutional right of a protection against double jeopardy.

If the Statute is construed as creating a new offense, then the indictment has charged two offenses and the jury has found the defendant guilty of two offenses under one issue in which the evidence against him in respect to one charge will be conclusively presumed to have prejudiced him in respect to the other charge.

Under only one view can the indictment be held sufficient.

If it is considered a valid indictment for a conspiracy alone, the murder being charged as an overt act and the conclusion of the indictment disregarded as surplusage and there are no errors in proceedings subsequent to the indictment, then the judgment can be sustained only to the extent to which the Court has imposed a punishment for the conspiracy proper, to-wit, one day's imprisonment and a fine of One Hundred Dollars.

If considered as an indictment for murder cognizable under 5509 properly limited the indictment is bad for duplicity, the instructions erroneous, the ver-

dict not responsive and the judgment imposes a double punishment.

It is respectfully submitted that judgment can under no view be sustained except as to the punishment of one day's imprisonment and the fine imposed and that unless reversed the improper part of the judgment should be arrested and the Court then affirm the proper part as above specified.

Most respectfully submitted,

WALLER R. STAPLES,
Of Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
JAN 7 1909
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908

No. 257

W. E. RAKES

PLAINTIFF IN ERROR

vs.

THE UNITED STATES

DEFENDANT IN ERROR

CONCLUDING NOTE FOR PLAINTIFF IN ERROR

UNION PRINTING AND MFG. CO., OPPOSITE POSTOFFICE, ROANOKE, VA.

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CONCLUDING NOTE FOR PLAINTIFF IN ERROR

Inasmuch as the reply brief for the Government was not filed until the hour for argument had arrived and counsel for plaintiff in error first saw the same on the morning of that day, counsel for plaintiff in error beg leave, in response to the Government's position that questions prerequisite to the jurisdiction of this court were not properly raised in the trial court, to call the attention of the court to the following extracts from the record in this case.

On page 17 is found the following:

> "Wherefore the said defendants say that the said indictment is wholly insufficient in law and is bad for duplicity as to each count thereof," etc.

And on pages 183 and 184, in his exception to the charge given by the trial court to the jury, the defendant said:

"That the said instruction authorizes the jury to find the defendant guilty of two offences under the same count in the same indictment, which is a deprivation of his constitutional right."

"That the instructions of the court, found in clauses 8, 9, 10, 11, on pages 5 and 6 of the instructions given by the court, are erroneous, for this, that it was improper and a denial of a constitutional right of the defendant to try the defendant for the crime of murder and of conspiracy under the same count in the same indictment."

"That instruction in clause 15, section (b), found on page 7 of the instructions given by the court, was erroneous and misleading, for this, that it authorized the jury to find the defendant guilty of two distinct offences, punishable by two separate and distinct punishments, under the same count in the same indictment, which in effect authorized a double punishment under one count in one indictment, which in effect deprived the defendant of his constitutional right of exemption from double jeopardy, and that the instruction contained in clause 16 is erroneous for the same reason."

It being the contention of counsel for plaintiff in error that to combine in one count two distinct offences deprives him of his right to plead an acquittal or conviction of one as a bar to the other.

The same point was raised in the exceptions appearing as bill of exceptions No. 8, on page 185 of the record.

Respectfully submitted,

WALLER R. STAPLES,
For Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

W. E. RAKES, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 257.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE UNITED STATES.

I.

This court is without jurisdiction to hear and determine this case on a writ of error to the district court, and it should therefore be dismissed.

If this court has jurisdiction, it must be either (1) because this is a case of a "conviction of a capital crime," or (2) because the constitutionality of a law of the United States is drawn in question.

(1) This is not a case of a conviction of a capital crime.

Plaintiff in error, with others, was indicted on September 13, 1907, in the District Court for the Western District of Virginia, for a conspiracy to injure, oppress, threaten, and intimidate one Peter Hall, a citizen of the United States, in the exercise and enjoyment of the right and privilege secured to him by the laws of the United States, of

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giving to the officers of the United States Government information as to the violation of the internal-revenue laws of the United States by plaintiff in error and others, the nature of the information being particularly described, and for, in carrying out said conspiracy, killing one Ann Hall. (Rec., pp. 1–5.)

A trial was had at the October term, 1907, when the jury returned the following verdict:

> We, the jury, find the within-named defendant, W. E. Rakes, guilty of conspiring as charged, and also guilty of murder in the second degree, and we fix his punishment for said last-mentioned offense at imprisonment in the penitentiary for fifteen (15) years. (Rec., p. 19.)

Upon this verdict judgment was subsequently pronounced (Rec., pp. 19 and 20); and it is the trial which resulted in this verdict and sentence that is sought to be reviewed by writ of error from this court.

Under the act of March 3, 1891 (26 Stat., 827, sec. 5), as amended by the act of July 20, 1897, ch. 68 (29 Stat., 492), a writ of error may issue from this court direct to a circuit or district court "in cases of *conviction* of a capital crime." The indictment against plaintiff in error was drawn under sections 5508 and 5509, Revised Statutes, and there is no doubt that he might have been convicted thereunder of a capital offense. The jury, however, found him guilty only of murder in the second degree.

By section 3664 of the Code of Virginia it is provided that—

> Murder of the second degree shall be punished by confinement in the penitentiary not less than five nor more than eighteen years;

and it was, therefore, beyond the power of the court or jury to inflict capital punishment upon plaintiff in error for the offense of which he was found guilty.

It will be observed that the statute, which fixes the jurisdiction of this court, provides that the party shall be *convicted* of a capital offense before his case can be removed directly to this court; and therefore the jurisdiction of the court does not depend upon the crime *charged in the indictment.*

In *Fitzpatrick* v. *United States* (178 U. S., 304, 307) Fitzpatrick was indicted for murder in the first degree, and the jury returned a verdict of guilty "without capital punishment." It was insisted by the United States that this court was without jurisdiction, because it was not a "conviction of a capital crime." In response to this contention the court said:

> It is clear, however, that, as section 5339 of the Revised Statutes inflicts the penalty of death for murder, the power given the jury by the act of January 15, 1897, c. 29, 29 Stat., 487, to qualify the verdict of guilty by adding the words "without capital punishment," does not make the crime of murder anything less than a capital offense, or a conviction for murder anything less than a conviction for a capital crime, by reason

> of the fact that the punishment actually imposed is imprisonment for life. The test is not the punishment which *is* imposed, but that which *may be* imposed under the statute.

Good Shot v. *United States* (179 U. S., 87) was a case presenting precisely the same state of facts, and in which the court, for the same reasons, held that it had jurisdiction.

It is clear, however, that under the rule there laid down, as well as under the positive and unambiguous terms of the statute, this court has no jurisdiction of the present case, because the accused was found guilty of murder in the second degree, for which the sentence of death could not be imposed, and he was not, therefore, *convicted* of a capital offense.

This distinction was recognized by the Circuit Court of Appeals, Sixth Circuit, in *Davis* v. *United States* (107 Fed. Rep., 754), and the jurisdiction of that court was maintained where under the indictment the defendant could have been convicted for a capital offense, but he was in fact found guilty only of a conspiracy.

(2) The constitutionality of no law of the United States is drawn in question.

It is true that counsel for plaintiff in error, in their brief, question the constitutionality of section 5509, Revised Statutes, under which, together with section 5508, the indictment was drawn, but

these sections have repeatedly been held to be constitutional by this court.

Ex parte Yarbrough, 110 U. S., 651.
United States v. *Waddell*, 112 U. S., 76.
Logan v. *United States*, 144 U. S., 263.
In re Quarles, 158 U. S., 532.
Motes v. *United States*, 178 U. S., 458, 462.

In *Logan* v. *United States*, *In re Quarles*, and *Motes* v. *United States*, both of said sections were involved, and while in the two former cases the question of constitutionality was not discussed, they being treated as constitutional, in the latter case both sections were expressly held to be constitutional.

It is insisted by plaintiff in error that even though section 5509, Revised Statutes, be constitutional, yet the court improperly construed the same. This, however, would not give this court jurisdiction, as it is well settled that in order to justify the removal of a case from a district or circuit court directly to this court upon the ground that the constitutionality of the law of the United States is drawn in question, the *validity* and not the *construction* of such law must be attacked.

Balt. & P. R. R. Co. v. *Hopkins*, 130 U. S., 211, 226.
United States v. *Lynch*, 137 U. S., 280, 285.
South Carolina v. *Seymour*, 153 U. S., 353.
Linford v. *Ellison*, 155 U. S., 503.

II.

The trial court did not err in overruling plaintiff in error's plea that the state court had first acquired jurisdiction of his person, and in proceeding with the trial of the case.

Plaintiff in error filed a plea in which he alleged in substance that, previous to the finding of the indictment against him in the United States court and his arrest thereunder, he had been indicted in the state court for the same offense and taken into custody by the state authorities. (Rec., pp. 7 and 8.) Without considering the technical questions raised with reference to the demurrer filed to this plea and the action of the court thereon, and its subsequent withdrawal and the filing of a replication thereto, and the courts action upon the replication and the proof introduced thereunder, we insist that no question is here presented of which plaintiff in error can take advantage. The plea presented only a question of comity existing between the United States and the State of Virginia; and by the previous finding of an indictment by the state court and the arrest of plaintiff in error by the state authorities he was not vested with a right to be first tried in the state court.

A similar question was presented to the Supreme Court of the State of Illinois in *Mackin* v. *People* (115 Ill., 312), and with reference thereto the court said:

> It is claimed, however, on the part of the petitioner, that although Mackin was per-

> sonally present in court during the trial of the cause, although there was actual control of his person, still that the fact that he had been previously arrested and had previously given bail for his appearance in the United States circuit (district) court, rendered that presence as to him and as to the conviction which followed, a fraud upon the law and a nullity, so that in construction of law there was no jurisdiction of the person. We are not able to coincide in this view. We concede the position established by the numerous authorities that are referred to in the petition, that where a party commits offenses against two or more jurisdictions, the jurisdiction first obtaining custody of the defendant is entitled to proceed and try him. That, however, is a matter more of comity, and in order to avoid unseeming strife between conflicting jurisdictions, than as a matter of right to the defendant. We do not recognize that a defendant who is guilty of crime has a constitutional, statutory, or common-law right absolutely to be tried for one offense before he is tried for another offense.

This rule was followed by District Judge Morrow in *In re Fox* (51 Fed., 427, 430).

With reference to the extradition of parties from one State to another, the general rule is that—

> It is not a cause for exemption from prosecution for a crime that the accused was illegally arrested in another State and unlawfully brought within the jurisdiction of the

State against which he offended. He is not protected from prosecution even if he is kidnaped in the other State and brought into the State without a semblance of right. It follows therefore that he is not wronged by being subjected to its jurisdiction, although the requisition proceedings were not strictly legal. (19 Cyc., 99.)

Mahon v. *Justice*, 127 U. S., 700, 707.
Kerr v. *Illinois*, 119 U. S., 436.
State v. *Ross*, 21 Iowa, 467.
In re Dows, 18 Pa. St., 37.
State v. *Smith*, 1 Bailey (S. C.), 283.
Brookin v. *State*, 26 Tex. App., 121.

In *New Jersey* v. *Noyes* (Fed. Cases, No. 10164) the court well said:

A person arraigned for the commission of a felony can not plead in bar that he ought to be excused from answering the charge because other parties trespassed upon his personal rights. It is confounding of matters which are essentially separate and distinct. It is a claim on the part of the accused that his criminal violations of the law are to be condoned by his personal injuries. It is asking a court to suspend its most responsible duties, to wit, the trial of alleged offenders against the penal code of the state, while the persons charged with the crime are instituting preliminary investigations into the methods adopted to bring them within its jurisdiction. Such a course, for obvious reasons, is allowable in a civil suit between private litigants, but, for like obvious reasons,

can not be and never has been allowed in criminal proceedings, where the object of the prosecution is to punish an offender against the public.

The cases of *Taylor* v. *Taintor* (83 U. S., 366) and *In re James* (18 Fed., 853), cited in plaintiff in error's brief, have no bearing upon this question. In *Taylor* v. *Taintor* the court held that where a person had been indicted and placed under arrest in one State and had executed his bond for appearance at the next term of court, and had subsequently gone into another State, and had there been extradited at the instance of the governor of a third State, and was held in custody by the authorities of such third State, and could not therefore comply with the conditions of the bond executed in the first State, such facts did not relieve the sureties on said bond from liability. This case, of course, did not involve the validity of the conviction and sentence of the accused himself. The court held in *In re James* that as a matter of comity between a federal court and a state court, where the right of a State to appear by its judicial officers to object to proceedings to remove a prisoner from the jurisdiction of its courts fully appears, the accused will be turned over to the state authorities, because such a course "is necessary to avoid unseeming conflicts between federal and state authorities," but there was no intimation that this would be done for the benefit of the accused himself.

In the present case the record discloses that there was no friction whatever with reference to these proceedings between the state and federal courts. The evidence introduced before the trial judge on the question raised by the plea and replication shows that it was largely at the instance of the commonwealth's attorney, Mr. Hooker, that the United States authorities investigated the crime of which plaintiff in error was accused and returned against him an indictment; that he imparted to the officers and agents of the United States Government all the information he possessed, and gave them such advice as he deemed to be beneficial, and encouraged them in making the investigation and procuring the indictment, the reason being, as stated by Mr. Hooker, that the State of Virginia had appropriated practically no funds to make investigations of this character. .(Evidence of Saml. H. Hoge, Rec., p. 23–26; E. P. McAdams, Rec., p. 30–31; S. A. Thompson, Rec., p. 41.)

Mr. Hooker, the commonwealth's attorney, was himself present at the hearing of this plea, and at the instance of the court was called to the witness stand, and fully corroborated the testimony given by the Government officers, and among other things testified with reference to a continuance of the case pending in the state court, that when the case was called he stated in substance to the court that it was passed because of the fact that the

Federal Government had taken charge of the case, as he understood (Rec., p. 36). In regard to a conversation he had had with United States Attorney Moore relating to this case, he testified:

> I understood, and I think that was understood by Mr. Moore, Mr. Hoge, and myself, when we first discussed this case in Danville, that we could afterwards—that there could be no conflict, that we would not fall out about where the case was tried. The main object in view, and I believe on the part of these other gentlemen, was to get justice done. I have always been under the impression since the matter came up that the Federal court had jurisdiction in the matter if they cared to exercise it. I thought if they tried the case that I would render them any service just as cheerfully as they would render it to me if it was tried in the state courts.
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> * * * * *
>
> It is possible that I may have started them after Wm. E. Rakes, and I don't know that I ought to say they have hindered and delayed me, because if the Federal authorities had not taken charge of it I would have had a trial of it before now. I would have pressed for a trial, but since the Federal authorities had charge of it I have not attempted to have a trial in the Circuit Court of Patrick County. (Rec., p. 39.)

Subsequently the following question and statement was put to Mr. Hooker by the court: (Rec., p. 40):

> Will you now kindly state your attitude as commonwealth's attorney with reference to said matter? To put it otherwise, Mr. Hooker, if you feel that your duty as commonwealth's attorney calls on you to make a motion in this court to the effect that it do not proceed further with the trial of Wm. E. Rakes and that he be released from the custody of the marshal, in order that you may proceed with a prosecution in the State court, my opinion is that this court should not proceed with this trial. If, however, you do not desire or feel constrained to make such motion, then I feel that there would be no breach of comity in proceeding with said trial, and that the judgment on the plea should be against the defendant.

Thereupon he asked time to consult with the judge of the circuit of which he was commonwealth's attorney, and time being given he conferred with said judge and returned to court, and then announced his determination not to move for the surrender of the custody of the plaintiff in error in the following language:

> I do not desire to make any motion that this court surrender the custody of William E. Rakes or that he be remanded to the custody of the circuit court of Patrick County for trial of the case there pending against him. I will further say that I have

> seen Judge Harvey since Saturday and have discussed this case with him and the jurisdictional question that has been put up to me, and he stated, and authorized me to state, that he felt that the ends of justice were more desirable to be attained than any jealousy about jurisdiction of courts. I will also further state that so far as I am concerned I feel that I would be breaking faith with the district attorney's office if I in any way interfered with the prosecution of the case against Rakes, pending here; and in view of all the circumstances of the case, and after a full conference with Judge Harvey, I feel that it is my duty as commonwealth's attorney of Patrick County to go on record declining to make the motion to remand. (Rec., p. 42.)

And in answer to a subsequent question by counsel for plaintiff in error, he stated—

> I most positively and emphatically decline to make the motion, and, as heretofore stated, I am doing this with the full approval of the judge of the Circuit Court of Patrick County. (Rec., p. 43.)

It would indeed be a novel rule which would permit plaintiff in error to escape punishment for a crime in the United States court, simply because he had previously been arrested under an indictment found by a state court, when the state authorities were giving aid to the federal authorities in the prosecution of the case in that court, and were in that court not only expressing their willingness

that it might proceed with the hearing, but expressly and emphatically refusing to ask that he be turned over to the state authorities that he might be proceeded against in the state court. Under such circumstances, the rule of comity would rather require the United States authorities to proceed with the trial, inasmuch as the state authorities had expressed a desire that such be done.

III.

The court did not err in overruling the demurrer to the indictment.

The demurrer is based upon the assumption that the material ingredients of the offense are charged as conclusions of law, and were not charged with sufficient certainty. (Rec., pp. 14 and 15.) However, the argument in plaintiff in error's brief takes a much wider scope, and it is also insisted, (1) that section 5509 is unconstitutional, and (2) that the offense is not properly charged in the indictment, or rather that two offenses are charged in each count.

Neither of these contentions is well taken, for the following reasons:

(1) Section 5509, Revised Statutes, is constitutional. We have heretofore cited three cases, to wit, *In re Quarles*, *Logan* v. *United States*, and *Motes* v. *United States*, in which this section has

been enforced by this court, and in the last one of which it was said that—

> No question has been made—indeed none could successfully be made—as to the constitutionality of these statutory provisions.

No juggling of words can place such a construction upon section 5509 as would make it embrace crimes cognizable by the States alone and thus bring it in conflict with the Constitution. When sections 5508 and 5509 are read together, the meaning is not at all obscure; nor can the latter section admit of the meaning contended for by counsel for plaintiff in error that it was intended to embrace every act committed by a conspirator described in section 5508, from the time of the formation of the conspiracy until the consummation of the same. The illustration used by counsel on page 25 of his brief, that one of such conspirators may be hurrying along a highway to the appointed rendezvous and may meet an ancient enemy, a rival in a love affair, and allay his haste and for revenge commit an assault upon such enemy, well shows the absurdity of such a contention. An assault of this kind is not committed "in an act of violating" section 5508; for certainly, the postponement of the conspiracy for the purpose of wreaking personal vengeance upon another party is not an act done in furtherance of the conspiracy; nor can it be properly said that

any act of any character that may be done by such a conspirator during the time the conspiracy is in progress of consummation, which is not done in furtherance of the conspiracy, but outside and independent of the same, is done "in the act of violating" the provisions of section 5508.

Furthermore, it is perfectly clear that no independent offense is created by section 5509, but that it only provides for an additional penalty in case the offense described in section 5507 or 5508 is attended with the aggravating circumstances described in said section 5509.

The purpose of this section is perhaps more fully described by Judge Severens, in delivering the opinion of the Circuit Court of Appeals, Sixth Circuit, in the case of *Davis* v. *United States* (107 Fed., 753, 755) than elsewhere, in the following language:

> Counsel for the plaintiff in error, who submits the case on a brief, alleges six grounds on which he contends for a reversal of the judgment, the first two of which may be considered together. They are: First. In the first place, we insist that the indictment does not charge the crime of conspiracy as such, but alleges the existence of the conspiracy for the sole purpose of giving the court jurisdiction of the crime of murder. Second. The crime of murder and the crime of conspiracy are two separate and distinct offenses, and the crime of murder does not include or embrace the crime of

conspiracy, and defendant can not be tried for two separate and distinct offenses at the same time.

These contentions are based upon a misconception of the effect of sections 5508 and 5509. They do not contemplate two distinct offenses against the United States. Only the conspiracy is of federal cognizance, and it is that offense which is made punishable. If, in the prosecution of it, a thing is done which is a crime by the laws of the State, the conspiracy is punishable by a measure of punishment equal to that prescribed by the law of the State for such other crime. But it is an aggravation merely of the substantive offense of conspiracy. If the latter is not proven, there can be no conviction for the offense which constitutes the aggravating circumstance, and the proceeding falls to the ground. It is plainly indicated in *Motes* v. *U. S.* (178 U. S., 458; 20 Sup. Ct., 993; 44 L. Ed., 1150) that this is the view taken of these sections by the Supreme Court. It can not be doubted that it was within the power of Congress to deal with such a conspiracy and impose such punishment therefor as it should deem proper; and, having such authority, it was competent to take notice of such incidents of violence and wrong as were likely to happen in the prosecution of such combinations, and to measure the punishment by that which is prescribed by the local law for such acts when made,

of themselves, the subject of punishment. Though measured by those laws, the penalty is imposed by the law of the United States.

(2) The offense is properly described in the indictment.

Plaintiff in error insists that in each of the two counts of the indictment two offenses are charged, to wit: The offense of a conspiracy in violation of section 5508, Revised Statutes, and the crime of murder in violation of the laws of Virginia. It is apparent that this insistence is not sound, inasmuch as section 5509 does not create an independent offense, but only prescribes a penalty. Consequently, the crime of murder in violation of a State law is not an offense under these statutes, but such offense and the necessary ingredients thereof are properly charged in an indictment drawn under section 5508, in order that the penalty prescribed therefor may be imposed by the court or jury.

Nor is the offense of murder charged in the indictment as a separate and distinct offense, but it clearly appears from the allegations thereof that the facts with reference thereto are charged merely as an aggravation of the offense of conspiracy, and to justify the infliction of the penalty prescribed by section 5509.

Without repeating in detail the various allegations of the indictment, we insist that each of the counts thereof are not only sufficient in substance, but that all the essential ingredients of the offense

and the facts necessary to constitute the same, as well as those essential for the infliction of the penalty prescribed by section 5509, are fully and correctly set forth. (Rec., pp. 1–5.)

We further insist that inasmuch as the record fails to disclose that the questions on the demurrer now presented in the brief and argument of plaintiff in error, except the insistence that the indictment charges a conclusion of law, were not raised in or considered by the court below, they can not be considered by this court.

IV.

The evidence is not only sufficient to support the verdict of the jury, but it conclusively demonstrates plaintiff in error's guilt.

A brief summary of the most important items of evidence is as follows:

It appears that in the section of country where this crime was committed, there had been located a large number of illicit distilleries; in fact, it seems to have been a perfect nest of lawlessness in this respect. Peter Hall, a boy about 17 years of age, in the early part of December, 1906, reported to the revenue officers the fact that William E. Rakes was conducting an illicit distillery, and on December 15, 1906, the officers, acting on the information thus obtained, destroyed Rakes's distillery. (Evidence Peter Hall, Rec., pp. 47–48; E. Parr, Rec., pp. 78–79; J. W. Staples, Rec., p. 86.) About the first of March, 1907, Hall also

reported to the officers that Grover Beamer was conducting an illicit distillery, and on the night of March 6 the officers, in company with said Hall, destroyed this distillery. (Evidence Peter Hall, Rec., p. 48; H. L. Lawson, Rec., pp. 82–85; J. W. Staples, Rec., pp. 86–88.) About a week after Hall had reported Rakes's distillery, he told Rakes's brother-in-law, Chas. Nowlin, what he had done. (Evidence Peter Hall, Rec., p. 70.) After this he was arrested and put in jail for trespass at the instance of Nowlin. (Evidence J. W. Staples, Rec., p. 88.) And he appears to have been both before and after this persecuted with numerous petty prosecutions at the instance of Rakes and his relatives. (Rec., pp. 54–55.) Rakes told Sam Hall during the summer before the murder that he was a moonshiner, and if a man reported him he would kill him. (Evidence Sam Hall, Rec., pp. 99, 100.) About the first of March, 1907, Rakes asked J. H. Dillon, a justice of the peace, to fine Peter Hall $100 for carrying a pistol, stating that he would be unable to pay the fine and the revenue officers could not pay it, and he would have to go to jail. (Evidence J. H. Dillon, Rec., pp. 89, 90.)

Alexander Rakes, sometime before Christmas, 1906, bought some whisky from William E. Rakes, and he told the witness at that time that Peter Hall had reported his distillery, and had damaged him some forty or fifty dollars. (Evidence Alex. Rakes, Rec., p. 74.)

When the witness J. W. Staples returned from the raid upon Beamer's distillery, in which it was destroyed, he met William E. Rakes on the court-house steps, and said to him that they had cut up another still in his neighborhood, and Rakes replied, "Why are you all allowing Peter Hall to report his own distilleries? By G—d, aren't you all going to do anything with him for it?" Witness told Rakes that if he would have a warrant issued for Hall and furnish evidence he would execute the papers, to which Rakes replied, "No, it don't seem like you all will. You all let him report his own distilleries, it seems like; G—d d—n him, he ought to be killed." (Evidence J. W. Staples, Rec., pp. 88–89.)

The murder occurred on the fourth Sunday night in March, and on the Saturday before Rakes and Grover Beamer were together at some kind of a gathering. (Evidence Geo. L. Roberson, Rec., p. 131.) On Sunday, before the murder that night, William Rakes, in company with Peach Rakes, Will T. Rakes, George Booth, George Martin, Peter Martin, and Cal Mack Alexander, was at Peach Rakes's distillery, about five miles from the residence of Ann Hall, and William E. Rakes had with him a Winchester shotgun, and he, George Martin, and George Booth left together, and after they had gone a short distance they called Peach Rakes to them and had a talk, and Peach Rakes went off with them, but came back in a short time, and again left about a half hour before

sundown. (Evidence James Emerson, Rec., pp. 90–91.) William Rakes arrived at this distillery about 10 o'clock in the morning (Rec., p. 90), and it appears to have been probably an hour before sundown when he left (Rec., p. 93). Wm. Rakes was the owner of a 12-gage Winchester shotgun. (Ev. Geo. Brammer, Rec., p. 128.)

Grover Beamer spent a portion of his time with George L. Roberson, and when there he slept with Henry Roberson. About 12 o'clock on the day before the shooting, Peter Hall saw Henry Roberson at Ann Hall's, and Grover Beamer was at George Roberson's that evening, and left his house between sundown and dark, and next morning returned to Roberson's from the direction of Ann Hall's house. (Evidence Peter Hall, Rec., p. 71; George Roberson, Rec., p. 131.)

Peter Hall's home was with his aunts, Ann and Jane Hall, but at times he was at Elizabeth Hall's, the mother of one Sam Hall, and he stayed there a portion of Saturday night and Sunday, but on Sunday night was at his aunt Martha Thomas's. (Evidence Peter Hall, Rec., pp. 47, 67.) Sam Hall was on different occasions with Peter Hall hunting for stills. (Evidence Sam Hall, Rec., pp. 100, 105, and 106.) Sam Hall testifies that he was living with his aunt Elizabeth and was there the night the murder occurred; that Grover Beamer and a number of other persons came to the house in the fore part of the night, and Beamer burst the door down and searched the house for Peter Hall, saying that

he wanted him, and telling witness that if he told what had occurred he would kill him; that Beamer was the only person who came into the house, but that he heard Wm. E. Rakes's voice on the outside; that Beamer asked him for some matches and he replied that he had none; that they remained there but a short time, and when they left witness heard them say they would get Peter Hall at the next house; and that they left, going in the direction of Ann Hall's house. Witness was sitting on the bed, and the door opened back against the foot of the bed, and he consequently could not see anyone at the door or outside the house. (Rec., pp. 98–99.)

Elizabeth Hall, with whom Sam was living, testified that William E. Rakes, Grover Beamer, and Charlie Turner came to her house, and that Grover Beamer burst the door down; that they called for Peter Hall and searched the house for him; that two of them drew their guns ready to fire, in order to kill Peter Hall as he came out of the house; that she would not let them come into the house, and Will Rakes said they were going to kill her if she did not let them in. Rakes was there at the door and helped to push it open, and she saw as many as four guns in the crowd, but Grover Beamer was the only one who came into the house; soon next morning she heard of Ann Hall being killed. (Rec., pp. 95–96.)

This witness appears to have been rather deaf, and the defense manifestly relied upon this fact to

weaken her testimony as to what was said. On this night, however, the moon was shining brightly, and it was no trouble for her to recognize any person who was standing in the door or yard, and furthermore no attack is made upon her character.

The only eye-witness of what occurred at the time Ann Hall was killed was her sister, Jane Hall, who testified that after midnight, between 1 and 2 o'clock, she heard their dog bark, and then heard the report of a gun. She got up and went to the door and saw a bunch of men; they divided and went around the house and commenced shooting into the house; she opened the door and left it open; her sister Ann started toward the fire and said her arm was ruined, and then fell to the floor and said: "I am done, I am done." That after they stopped shooting, Grover Beamer burst the door open and came into the house, and plaintiff in error, and a bunch of men came to the open door, and she knew Rakes as soon as she saw him. That he came up on the southwest side of the house and she asked him to come and help her with her sister, and he replied, "Let her lie and sleep while she can." That Grover Beamer came into the house and tore the things up and asked her where Peter Hall was, and she replied that Peter Hall did not stay there, and he said: "The man I am going to have before I leave here" (referring to Peter Hall); and then he said with reference to Ann Hall, who was lying on the floor: "I have seen a heap of people in this fix;" that when

she spoke to plaintiff in error she called him Will Rakes, and he was then standing at the door, and Beamer was in the house lighting matches and hunting for Peter Hall and tearing things up; and he turned over the molasses and threw the table out of the door.

That it was a light, moonshiny night and she saw five men, and there were more on the outside; and she started out to see who they were, but they said they would shoot her if she came out there. (The door, which was riddled with shot, was presented to and indentified by witness.) Witness stated that she was afraid they would burn the house with her sister Ann in it, and consequently tried to get her to the door and pulled her in that direction; and that she lived not over ten or fifteen minutes after she was shot. Witness then went after some parties, and Robert E. Lee and Gillie Thomas came back with her. She thinks there were 9 shots fired, 8 of which were fired into the house. (Rec., pp. 108–112.)

It appears that 28 shot had entered the body of the deceased Ann Hall, scattered from her hip to shoulder, and one had entered the cavity near her heart. (Evidence Dr. L. C. Dickerson, Rec., p. 157, 158.)

W. A. Elgin, Gillie Thomas, and Ben Hall went to Jane and Ann Hall's house that night, and Mr. Hooker, the commonwealth's attorney, was there during the following day, and they all testify that the furniture in the house was scattered about;

that there was a large amount of molasses spilled on the floor, and that the door had been riddled with shot, as had also a window, and that a number of 12 and 16 gauge shells were lying in the yard, thus corroborating in every particular as far as physical conditions could do so the testimony of Jane Hall as to what occurred at the time of the murder. (Rec., pp. 123–124; 125–126; 126–127; 154–155.)

Moreover, Beamer, who had previously been convicted, was placed upon the witness stand, and his counsel stating that he intended to appeal Beamer's case, and the court informing him that he was not bound to testify, he refused to make any statement with reference to any material fact. (Rec., p. 132.)

Plaintiff in error Rakes, when arrested under a state warrant, undertook to testify in his own behalf, and at first stated that he was not away from his home during the entire day before and the night of the shooting, but afterwards stated that he was the day before down at Turner Rakes's mill. (Rec., p. 155; evidence J. H. Dillon, Rec., p. 157.)

The only evidence offered by the defense was a number of witnesses to testify as to the character of Jane Hall and Peter Hall and Sam Hall; also Will T. Rakes (not plaintiff in error), who testified that on Sunday he was at Peach Rakes's distillery with William E. Rakes and others, but that he remained at home the night of the murder, and his

wife, who corroborated him as to his being at home. (Rec., pp. 162, 165.) It can not be seen how this testimony is of any importance whatever.

We submit that no impartial person can carefully read the testimony in this record and reach any other conclusion than that plaintiff in error, together with Grover Beamer and a number of other parties, conspired together to injure and intimidate, and in fact to kill Peter Hall, because of the fact that he had informed against them with reference to their illicit distilleries, and that in carrying out this conspiracy on that night they went to the house of Ann Hall, and believing that Peter Hall was therein fired a number of shots into the house, one of which took effect in the body of Ann Hall, as a result of which she died.

One of the strongest corroborating circumstances is the fact that notwithstanding the sympathy of that entire community with these conspiritors, which is shown in the cross-examination of the various witnesses introduced to impeach the charter of the Government's witnesses, yet there is not a single item of material evidence offered on behalf of plaintiff in error. The court, therefore, properly refused to exclude the entire testimony and thus direct a verdict for the defendant.

V.

The court did not err in ruling adversely to plaintiff in error upon the following questions of evidence:

(1) Peter Hall was asked the following question by the district attorney: Question. How many

illicit distilleries have you seen there on the land of William E. Rakes and C. P. Nolin and Robert E. Lee during the last five years? To this question defendant objected, which objection was by the court overruled, and the witness answered: Answer. "I don't remember that I have seen any on William E. Rakes' land. As to C. P. Nolin's, I don't reckon there is a branch on his land anywhere that a distillery could be put up, but that there is one." (Rec., p. 170.) C. P. Nolin was Rakes' brother-in-law, and had been engaged with Rakes in instituting petty prosecutions against Peter Hall. (Rec., pp. 54, 55.)

The verdict can not be set aside on account of this ruling of the court, because,

First. No ground for the objection was stated.

Second. The objection was not to the answer, but to the question as a whole, when certainly it was competent to show what distilleries, if any, witness had seen upon the land of William E. Rakes.

Third. The fact that there were and had been numerous distilleries in that locality, many of which were upon the property of Rakes' brother-in-law, tended to show that the conspiracy proven was against Hall, as an informer against illicit distilleries.

Fourth. The evidence was of such character as not to materially prejudice plaintiff in error even if it were incompetent.

(2) The following occurred on the examination of witness Alexander Rakes: "Question. Have you been threatened by any one interested in this prosecution since you came here? Answer. No; not particularly. Question. How about Bill Turner, the father of Charlie Turner? To which question the defendant objected, the objection being overruled by the court, and the witness answered: Answer. He met me on the street and took me—— Witness was here interrupted by the following question from the district attorney: Question. So he met you on the street. What did he say to you? Answer. He said that I had better be careful, that if one side did not get me the other would. To which action of the court the defendant, by counsel, excepted." (Rec., p. 171.)

This action of the court is not a reversible error, because,

First. No ground for the objection was stated.

Second. It appears that this same witness had been called once before and did not tell of this circumstance, and the purpose of the district attorney was to show that it was omitted by witness on the previous examination on account of these threats (Rec., p. 73), and thus induce the jury to place credence in the statement, although told them for the first time. For this purpose it was certainly admissible.

Third. The evidence was not material or injurious to plaintiff in error.

(3) The district attorney asked witness Alexander Rakes whether or not he had a conversation with William E. Rakes after the still had been cut up by the officer. To this question objection was interposed on the ground that the time and place of the conversation should be stated, which objection was by the court overruled. (Rec., p. 171.)

This ruling of the court was proper, because,

First. Rakes being a defendant and not a witness, it was not necessary for the witness to state the time and place of the conversation.

Second. Witness was subsequently cross-examined by counsel for plaintiff in error, and he had opportunity to have witness fix the time and place of the conversation if he deemed such fact material.

Third. The failure to fix the time and place of the conversation was immaterial, and the record fails to disclose how it could in any way have injuriously affected plaintiff in error.

(4) During the examination of witness, Ben Hall, the Government was permitted to exhibit to the jury a gun which witness stated looked like the gun that he had seen in the possession of Grover Beamer, one of the alleged coconspirators who was indicted with plaintiff in error. At the same time there were also exhibited some shells, and counsel for plaintiff in error stated that they had no objection to the shells. (Rec., p. 132.)

There is no dispute that Ann Hall, the deceased, was killed by the firing of shot from a gun, and that Grover Beamer had a gun of the same char-

acter as the one exhibited, and that shells of this number and character had been sold Beamer before the killing by Geo. Roberson (Rec., pp. 132, 133), and the same kind of shells were found empty in Ann Hall's yard the day after the shooting.

We are unable to see how, under these circumstances, the mere introduction of a gun could prejudice the jury against plaintiff in error. Certainly it could have no more serious effect than the shells, which were introduced with the consent of counsel for plaintiff in error.

(5) The court's action in refusing to permit the wife of plaintiff in error to testify as to his whereabouts on the night of the alleged murder, is assigned as an error. (Rec., p. 172.)

This action of the court was correct, inasmuch as plaintiff in error was not being tried on a charge of murder under the laws of the State of Virginia, but was being tried for an offense committed under section 5508 of the Revised Statutes of the United States, and in accordance with the rules of evidence governing the United States courts.

(6) Plaintiff in error offered to prove by J. J. Brammer that Peter Hall was a notorious and offensive character in the community; that the better people in the community were afraid to leave their homes unprotected because of his dangerous character; that the said Peter Hall had made threats against parties other than the defendants charged in the indictment that he would destroy their property, and that such parties took

precaution to prevent such destruction; that the witness Brammer was employed by a brother-in-law of the defendant who resided in that vicinity to watch his barn and to look out for Peter Hall, who had made threats against him. The court, upon objection of the Government, declined to permit proof of said facts, and this action of the court is assigned as error. (Rec., p. 172, 173.)

It will be observed that none of the threats mentioned were made against plaintiff in error Rakes, nor does it appear who the brother-in-law was against whom an alleged threat was made, or what were the relations between such brother-in-law and Rakes, or whether, therefore, such a threat would be calculated to excite the hostility of Rakes against said Hall. It certainly can not be inferred that a conspiracy would be entered into by individuals of a neighborhood against another person on the ground that he was not a desirable citizen or was a worthless character, in the absence of some evidence tending to show that his worthlessness in some way affected the conspirators; and therefore the mere proof of improper acts on the part of Hall toward other parties than the defendant Rakes would not tend to show that Rakes's conduct toward him was the result of any motive other than such as he may have acquired from Hall's having informed against him as an illicit distiller.

There is not a particle of evidence indicating that the crime charged was committed by other

parties than those alleged in the indictment, and is not intimated anywhere in the record that the parties against whom these alleged threats were made had any connection whatever with the crime, and therefore the mere threat of Hall to burn the barn of some person who is not connected with the crime in the remotest degree would be wholly immaterial; and as shown in the quotation from Wigmore on Evidence, sections 139, 141, on pages 43, 44 of plaintiff in error's brief, by the majority of the courts such threats are not under any circumstances admissable, even though it be attempted to show that the party against whom made may have been connected with the crime.

Furthermore, the general rule is that it is not competent to prove the character of parties or witnesses by special acts of such parties. (Cyc. Evidence, 36, 39.)

VI.

The court committed no error in giving the instructions which were submitted to the jury, and refusing the propositions requested by counsel for plaintiff in error.

(1) It is insisted that the instruction to the jury that—

> Therefore, the second section means that if a felony or misdemeanor be committed by persons who have conspired with the intent stated in the first section in pursuance of, or in carrying into effect the purpose of such conspiracy, *the punishment for*

> *the offense under the state law shall be in this case governed by the law of Virginia.* (Par. 1, Rec., p. 179.)

There is certainly no error in this instruction, as section 5509 expressly provides that, if in violating the previous section, any other felony or misdemeanor be committed, the punishment inflicted shall be that which is attached to such felony or misdemeanor by the laws of the State in which the offense is committed—in this case, the laws of the State of Virginia.

(2) Plaintiff in error requested the jury to charge—

> That where it has been clearly proven to the satisfaction of the jury that a witness is not to be believed on oath, no statement of such witness, standing alone and of itself, is sufficient to prove any material fact beyond a reasonable doubt. (Rec., p. 178.)

The court refused this instruction, but charged the jury fully with reference to the rules governing the credibility of witnesses. (Pars. 4 and 5, Rec., pp. 179, 180.) The instruction requested should have been denied. It would have been an intimation upon the part of the court that it had been proven to his satisfaction that the witnesses on behalf of the Government were not to be believed on oath, when such was not the fact. Notwithstanding the bad character of a witness, yet it is the province of the jury to determine what credence shall be given him; and if such witness tells

a reasonable story, and conducts himself upon the witness stand in a proper manner, and is corroborated by other material testimony, the jury is well warranted in giving such witness full faith and credit.

(3) Plaintiff in error requested the court to submit to the jury the following instruction:

> The court instructs the jury that the law presumes the defendant to be innocent; that such presumption follows through the whole course of the trial; that the evidence must show the guilt of the defendant to the exclusion of every reasonable hypothesis of innocence consistent with the evidence. Therefore, in ascertaining the motive which actuated the alleged conspirators you must attribute to them any motive consistent with their innocence which can be reasonably reconciled with all the evidence. But, if you find beyond reasonable doubt that the intent was that charged in the indictment, you may find the defendant guilty of conspiring with said intent, although another or other reasons for conspiring may also have actuated some or all of the persons indicted. (Rec., p. 175.)

This instruction was refused, but in lieu thereof the court charged the jury as follows:

> Before you can find the defendant guilty of conspiring as charged, you must believe beyond all reasonable doubt that there was a conspiracy formed by the defendant and some one or more of the other persons

named in the indictment to injure, oppress, threaten, or intimidate Peter Hall because he had exercised the right of giving information of violations of the Federal internal-revenue laws. If you have a reasonable doubt as to the reason for the formation of the conspiracy charged in the indictment, you should acquit the defendant. However, the mere fact that some of the alleged conspirators may have been actuated by some motive not connected with "informing" by Peter Hall is not ground for acquittal, if you believe beyond a reasonable doubt that at least one of such other alleged conspirators and the defendant conspired to injure or intimidate said Hall, mainly and chiefly because said Hall had exercised his rights as an "informer."

There is no material difference in substance in the request and the proposition charged. The statement to the jury that "If you have a reasonable doubt as to the reason for the formation of the conspiracy charged in the indictment you should acquit the defendant," is certainly as favorable a statement upon this subject as plaintiff in error was entitled to demand; and with reference to the co-existence of the motive charged in the indictment with other motives not charged therein, the court's charge was more favorable than the request, and in fact more favorable than the plaintiff in error was entitled to.

The court upon that question substantially said that in order to find defendant guilty the jury would

have to believe beyond a reasonable doubt that "at least one of such other alleged conspirators and defendant conspired to injure or intimidate said Hall, *mainly and chiefly* because said Hall had exercised his right as an informer," when it was sufficient if such motive *materially entered into the conspiracy*. It is manifest that if this expression impressed upon the jury that they should weigh the motives of plaintiff in error, it necessarily inured to his benefit, and not to that of the Government.

(4) Paragraphs 6 and 7 of the instructions given (Rec., p. 180) are criticized because the jury were told in substance that they should consider separately the question of guilt under the charge of conspiracy and the crime of murder, and that they might find plaintiff in error guilty of the former and not guilty of the latter.

It was necessary for the jury to consider said matters separately. In all cases the jury first determines the question of guilt and then the extent of the punishment; and if, in any case, a certain circumstance, if it exists, aggravates the offense and increases the punishment, it is necessary for the jury, after ascertaining the guilt of the accused, to determine whether or not such circumstance exists. In *Davis* v. *United States* (107 Fed., 754) the jury did the very thing the court here suggested might be done, that is, found the accused guilty of the conspiracy and acquitted him of the murder.

(5) It is complained that in paragraphs 8 and 10 of the instructions (Rec., p. 180, 181) the court defined to the jury murder in the first degree, when the evidence excludes the possibility of a conviction for such murder.

It is not denied that the definition given by the court was correct. But whether the evidence would warrant such a conviction is not now a material inquiry. All the jury agreed that the elements of murder in the first degree did not exist, and that part of the charge was therefore harmless.

(6) Request number 7 (Rec., p. 180), to the effect that Grover Beaman's motive could not affect plaintiff in error's motive, unless he knew of and acquiesced in such motive, was fully covered by section 5 of the instructions given.

(7) Paragraph 11 of the instructions (Rec., p. 181) refers to the right of the jury to find whether or not plaintiff in error was guilty of murder in the second degree, which has heretofore been considered; and the various forms of the verdict suggested by the court in paragraphs 12 and 16 (Rec., p. 181) were proper, inasmuch as it was the duty of the jury to determine whether plaintiff in error was guilty of the conspiracy, and if so, whether he was also guilty of the other offense, and of what degree.

(8) Plaintiff in error's fifth request, to wit:

> In ascertaining the motive which actuated the said alleged conspirators, the jury should

> take into consideration all the relations between the said Peter Hall and all or any of the alleged conspirators shown by the evidence. (Rec., p. 175.)

is immaterial. Any juror with common sense, without any instructions with reference thereto, would know that such was the purpose of introducing evidence on that subject. The court can not be required to call the jury's attention to every thought that might arise in their minds while considering the evidence.

(9) Requests 9, 10, and 11, which in effect ask the court to charge that the accused may have unlawfully conspired with others with respect to Hall and yet that fact be wholly insufficient to render him liable for the perpetration by one of his co-conspirators of an act of violence against some other person, wholly beyond the contemplation of the accused (Rec., pp. 176, 177), were not warranted by the evidence, and are not in fact the law.

Each conspirator is liable for any act or result that may probably flow from the conspiracy, whether that particular act or result was specially contemplated or not.

(10) The 14th and 15th requests of plaintiff in error (Rec., pp. 177, 178), which relate to the motive that may have actuated the conspirators, were embraced in the 5th and 6th paragraphs of the court's charge (Rec., p. 180).

VII.

The cause should not be reversed on account of the form of the verdict.

The verdict is in the following language:

> We the jury find the within-named defendant, W. E. Rakes, guilty of conspiring as charged, and also guilty of murder in the second degree, and we fix his punishment for said last-mentioned offense at imprisonment in the penitentiary for (15) fifteen years.

As heretofore stated, it was the duty of the jury to find, first, whether or not plaintiff in error was guilty of the charge of conspiracy, and second, whether or not he committed the other offense described in the indictment, to wit, murder; and it was furthermore the duty of the jury if it found him guilty of murder to fix his punishment.

Strictly speaking, however, it may be that the jury should have applied the imprisonment to his guilt on the charge of conspiracy, and not for the offense of murder. However, this is a mere technical error in form, and does not warrant the granting of a new trial, as it was the duty of the judge to refer the punishment to the proper offense.

VIII.

The judgment of the court is in proper form; but if not, if no other error be found in the record, the proper judgment should be entered by this court.

After overruling the motions in arrest of judgment and to grant a new trial, the judgment of the court proceeds as follows:

> And it is further considered by the court that the said W. E. Rakes be imprisoned in the United States penitentiary at Atlanta, Georgia, for a period of fifteen years and one day, commencing on the day said defendant is committed to said penitentiary, and that the United States of America do recover of and from said defendant the sum of $100 fine. (Rec., p. 20.)

Learned counsel do not suggest in what other language the judgment should be couched, and we are unable to conceive of any that could be more appropriate.

For the foregoing reasons we insist:

1. That the writ of error should be dismissed for the want of jurisdiction in this court; and,

2. If mistaken in this contention, that the judgment of the court below should be affirmed.

Respectfully submitted.

J. A. FOWLER,
Assistant Attorney-General.

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RAKES *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

No. 257. Argued January 4, 1909.—Decided January 18, 1909.

Jurisdiction of this court to review judgments of conviction in criminal cases under clause 3 of § 5 of the act of March 3, 1891, c. 517, 26 Stat. 827, as amended by the act of July 20, 1897, c. 68, 29 Stat. 492, depends on the sentence which can be imposed, and not on the crime charged in the indictment; and where the Federal statute prescribes that the punishment shall be the same as that prescribed by the state law and under the state law the punishment is less than capital a writ of error will not lie.

The suggestion in the brief of counsel of the unconstitutionality of the statute under which plaintiff in error was convicted, does not raise an issue involving the construction or application of the Constitution giving this court jurisdiction to review under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 827, when the contention presented has been heretofore adversely disposed of; nor does the assertion of errors of construction furnish a basis for jurisdiction under that statute.

THE facts are stated in the opinion.

Mr. Waller R. Staples for plaintiff in error.

Mr. Assistant Attorney General Fowler for defendant in error.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This is a writ of error issued directly from this court to the

District Court of the United States for the Western District of Virginia under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 827, as amended by the act of July 20, 1897, c. 68, 29 Stat. 492, and cannot be maintained unless this was a case of "conviction of a capital crime," or a case involving "the construction or application of the Constitution of the United States," or a case in which "the constitutionality of any law of the United States is drawn in question."

Plaintiff in error was indicted under §§ 5508 and 5509 of the Revised Statutes for conspiracy, and for killing one Ann Hall in carrying out said conspiracy, and was found guilty of the conspiracy and of murder in the second degree, the jury fixing the punishment "for said last mentioned offense at imprisonment in the penitentiary for fifteen (15) years." Judgment was rendered against him of imprisonment in the United States Penitentiary at Atlanta, Georgia, for a period of fifteen years and one day, commencing on the day of his committal to the penitentiary, and he was fined $100.

By § 5508 of the Revised Statutes it is made an offense against the United States for two or more persons to conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, the punishment prescribed being a fine of not more than $5,000, imprisonment not more than ten years and ineligibility to any office or place of honor, profit or trust created by the Constitution or laws of the United States. And by § 5509 it is provided that if in committing the above offense any other felony or misdemeanor be committed, the offender shall suffer such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed.

Section 3664 of the Code of Virginia enacts that "murder of the second degree, shall be punished by confinement in the penitentiary not less than five nor more than eighteen years."

Class 3 of § 5 gives the writ directly in "cases of conviction of a capital crime," and this case does not fall within it, because

under the verdict capital punishment could not be inflicted. The jurisdiction of this court, in this regard, does not depend upon the crime charged in the indictment, and it is clear that as the accused was found guilty of murder in the second degree, for which the sentence of death could not be imposed, he was not convicted of a capital offense.

In *Fitzpatrick* v. *United States*, 178 U. S. 304, Fitzpatrick was indicted for murder in the first degree, and the jury returned a verdict of guilty "without capital punishment," as permitted by the statute. The United States insisted that this was not "conviction of a capital crime," but Mr. Justice Brown, speaking for the court, said that the qualification "does not make the crime of murder anything less than a capital offense or a conviction for murder anything less than a conviction for a capital crime, by reason of the fact that the punishment actually imposed is imprisonment for life. The test is not the punishment which is imposed, but that which may be imposed under the statute." And see *Good Shot* v. *United States*, 179 U. S. 87. But in the present case the accused was found guilty of murder in the second degree, for which the sentence of death could not be imposed, and it was not a case where the penalty of death was escaped by qualification of the verdict.

In *Davis* v. *United States*, 107 Fed. Rep. 753, the defendant could have been convicted under the indictment for a capital offense, but was in fact found guilty only of a conspiracy, and the Circuit Court of Appeals for the Sixth Circuit correctly held that that court had jurisdiction. And, speaking through Severens, J., said: "Only the conspiracy is of Federal cognizance, and it is that offense which is made punishable. If, in the prosecution of it, a thing is done which is a crime by the laws of the State the conspiracy is punishable by a measure of punishment equal to that prescribed by the law of the State for such other crime. But it is an aggravation merely of the substantive offense of conspiracy. If the latter is not proven there can be no conviction for the offense which constitutes the aggravating circumstance, and the proceeding falls to the ground. It is

plainly indicated in *Motes* v. *United States*, 178 U. S. 458, that this is the view taken of these sections by the Supreme Court. It cannot be doubted that it was within the power of Congress to deal with such a conspiracy and impose such punishment therefor as it should deem proper; and, having such authority, it was competent to take notice of such incidents of violence and wrong as were likely to happen in the prosecution of such combinations, and to measure the punishment by that which is prescribed by the local law for such acts when made, of themselves, the subject of punishment. Though measured by those laws, the penalty is imposed by the law of the United States."

Nor can we see that the case involved the construction or application of the Constitution of the United States, or drew in question the constitutionality of a law of the United States, because no definite issue was raised in regard thereto, and, while in the brief of counsel for plaintiff in error it was suggested that § 5509 was unconstitutional, that contention, however presented, was long since put at rest. *Motes* v. *United States*, 178 U. S. 458; *Logan* v. *United States*, 144 U. S. 263; *In re Quarles*, 158 U. S. 532. And assertion of errors of construction furnishes no basis for jurisdiction on constitutional grounds under § 5 of the act of March 3, 1891.

Writ of error dismissed.